

# THE BULLETIN

---

*The Bulletin is a publication of the European Commission for Democracy through Law. It reports regularly on the case-law of constitutional courts and courts of equivalent jurisdiction in Europe, including the European Court of Human Rights and the Court of Justice of the European Communities, as well as in certain other countries of the world. The Bulletin is published three times a year, each issue reporting the most important case-law during a four month period (volumes numbered 1 to 3). The three volumes of the series are published and delivered in the following year.*

*Its aim is to allow judges and constitutional law specialists to be informed quickly about the most important judgments in this field. The exchange of information and ideas among old and new democracies in the field of judge-made law is of vital importance. Such an exchange and such cooperation, it is hoped, will not only be of benefit to the newly established constitutional courts, but will also enrich the case-law of the existing courts. The main purpose of the Bulletin on Constitutional Case-law is to foster such an exchange and to assist national judges in solving critical questions of law which often arise simultaneously in different countries.*

*The Commission is grateful to liaison officers of constitutional and other equivalent courts, who regularly prepare the contributions reproduced in this publication. **As such, the summaries of decisions and opinions published in the Bulletin do not constitute an official record of court decisions and should not be considered as offering or purporting to offer an authoritative interpretation of the law.***

*The Venice Commission thanks the **International Organisation of the Francophonie** for their support in ensuring that contributions from its member, associate and observer states can be translated into French.*

*The decisions are presented in the following way:*

1. Identification
  - a) country or organisation
  - b) name of the court
  - c) chamber (if appropriate)
  - d) date of the decision
  - e) number of decision or case
  - f) title (if appropriate)
  - g) official publication
  - h) non-official publications
2. Keywords of the Systematic Thesaurus (primary)
3. Keywords of the Alphabetical Index (supplementary)
4. Headnotes
5. Summary
6. Supplementary information
7. Cross-references
8. Languages

**T. Markert**

Secretary of the European Commission for Democracy through Law

# THE VENICE COMMISSION

---

**The European Commission for Democracy through Law**, better known as **the Venice Commission**, has played a leading role in the adoption of constitutions in Central and Eastern Europe that conform to the standards of Europe's constitutional heritage.

Initially conceived as an instrument of emergency constitutional engineering against a background of transition towards democracy, the Commission since has gradually evolved into an internationally recognised independent legal think-tank. It acts in the constitutional field understood in a broad sense, which includes, for example, laws on constitutional courts, laws governing national minorities and electoral law.

Established in 1990 as a partial agreement of 18 member states of the Council of Europe, the Commission in February 2002 became an enlarged agreement, comprising all 47 member States of the organisation and working with some other 14 countries from Africa, America, Asia and Europe.

**Secretariat of the Venice Commission**  
Council of Europe  
F-67075 STRASBOURG CEDEX  
Tel: (33) 3 88413908 – Fax: (33) 3 88413738  
[Venice@coe.int](mailto:Venice@coe.int)

## Editors:

Sc. R. Dürr, T. Gerwien, D. Jones, A. Úbeda de Torres  
A. Gorey, M.-L. Wigishoff

## Liaison officers:

Albania .....	A. Hysa	Liechtenstein.....	I. Elkuch
Algeria.....	H. Bengrine	Lithuania .....	J. Urbonaite
Andorra .....	M. Tomàs-Baldrich	Luxembourg.....	J. Jentgen
Argentina.....	R. E. Gialdino	Malta .....	A. Ellul
Armenia.....	G. Vahanian	Mexico.....	G. de Icaza Hernandez
Austria .....	C. Grabenwarter	.....	/ F. Tortolero Cervantes
.....	/ B. Adamovich-Wagner	Moldova .....	V. Sterbet
Azerbaijan .....	R. Guliyev	Monaco .....	C. Sosso
Belarus.....	S. Chigrinov / O. Sergeeva	Montenegro.....	N. Dobardzic
.....	/ V. Seledovsky	Morocco .....	A. Hassouni
Belgium.....	A. Rasson Roland / R. Ryckeboer	Netherlands.....	M. Chebti / M. van Roosmalen
Bosnia and Herzegovina.....	Z. Djuricic	Norway.....	K. Buun Nygaard
Brazil .....	J.-B. Magalhaes	Peru .....	K. Benvenuto
Bulgaria.....	E. Enikova	Poland.....	M. Nowak
Canada .....	D. Power / S. Giguère	Portugal.....	M. Baptista Lopes
Chile.....	C. Garcia Mechsner	Romania.....	T. Toader / R. Sabareanu
Croatia .....	M. Stresec	Russia.....	E. Pyrikov
Cyprus.....	N. Papanicolaou / M. Kyriacou	Serbia.....	V. Jakovljevic
Czech Republic.....	S. Matochová / T. Langasek	Slovakia .....	G. Fet'kova / J. Stivnický / Z. Gajdosova
.....	/ I. Pospisil	Slovenia .....	U. Umek
Denmark .....	L. Risager	South Africa .....	E. Cameron / L. Draga
Estonia .....	K. Aule / U. Eesmaa	.....	S.-J. Frith / S. Luthuli
Finland .....	F. Haggblom / G. Bygglin / T. Vuorialho	Spain.....	L. Pomed Sanchez
France.....	C. Petillon / L. Brau / V. Gourrier	Sweden .....	L. Molander / K. Norman
Georgia .....	I. Khakhutaishvili	Switzerland .....	P. Tschümperlin / J. Alberini-Boillat
Germany .....	G. Lübbe-Wolff / M. Böckel	“The former Yugoslav Republic of Macedonia” .....	.....
Greece .....	T. Ziamou / O. Papadopoulou	.....	T. Janjic Todorova
Hungary .....	P. Paczolay / K. Kovács	Turkey.....	A. Coban
Iceland .....	H. Torfason	Ukraine.....	O. Kravchenko
Ireland.....	T. Daly	United Kingdom .....	J. Sorabji
Israel .....	Y. Mersel	United States of America .....	P. Krug / C. Vasil
Italy .....	G. Cattarino	.....	/ J. Minear
Japan .....	H. Minami		
Kazakhstan .....	B. Nurmukhanov		
Republic of Korea .....	M. Shin / J.S. Ha		
Latvia .....	L. Jurcena		

European Court of Human Rights .....	S. Naismith
Court of Justice of the European Union .....	Ph. Singer
Inter-American Court of Human Rights .....	J. Recinos

Strasbourg, June 2011

## CONTENTS

Albania.....	239	Morocco .....	334
Armenia.....	242	Netherlands.....	338
Austria.....	243	Norway.....	339
Azerbaijan .....	247	Poland.....	340
Belarus.....	248	Portugal.....	349
Belgium .....	252	Romania.....	356
Bosnia and Herzegovina.....	260	Russia.....	359
Brazil .....	263	Slovakia .....	360
Canada .....	267	Slovenia .....	361
Croatia .....	270	South Africa .....	364
Czech Republic.....	278	Spain.....	370
Denmark .....	286	Switzerland .....	373
Estonia.....	287	“The former Yugoslav Republic of Macedonia” .....	378
France.....	289	Turkey.....	379
Germany .....	295	Ukraine.....	383
Hungary .....	310	United Kingdom .....	390
Israel .....	313	United States of America .....	392
Italy .....	314	Inter-American Court of Human Rights.....	399
Latvia .....	316	Court of Justice of the European Union.....	402
Liechtenstein.....	320	European Court of Human Rights.....	416
Lithuania .....	322	Systematic thesaurus.....	419
Mexico.....	327	Alphabetical index.....	437

There was no relevant constitutional case-law during the reference period 1 May 2010 – 31 August 2010 for the following countries:

Republic of Korea, Luxembourg.

Précis of important decisions of the reference period 1 May 2010 – 31 August 2010 will be published in the next edition, *Bulletin* 2010/3, for the following country:

Serbia.

# Albania

## Constitutional Council

### Important decisions

*Identification:* ALB-2010-2-001

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 19.03.2008 / **e)** 9/08 / **f)** Abrogation law / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, English).

*Keywords of the systematic thesaurus:*

4.6.8.1 Institutions – Executive bodies – Sectoral decentralisation – **Universities.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.4.21 Fundamental Rights – Economic, social and cultural rights – **Scientific freedom.**

*Keywords of the alphabetical index:*

University, autonomy.

*Headnotes:*

The autonomy of the university is an institutional form of academic freedom and a prerequisite to ensure proper implementation of the functions entrusted to the teaching staff and institutions of higher education. The principle of the autonomy of the university requires that universities should be responsible and transparent in their decision-making and in the control of their funds. This can be realised through supervision of the activities of universities by organisations with responsibility for such activity, but such supervision should be performed without violating the principle of the autonomy of the university.

*Summary:*

I. The appellants, the Conference of Rectors (representing the Rectors of all public universities), sought the repeal of the provisions of Law no. 9741 of 21 May 2007 on Higher Education in the Republic of Albania. The complainant argued that the provisions violated the principle of equality of citizens before law and the principle of the autonomy of the university, provided by Articles 18 and 57.7 of the Constitution.

They ran counter to the principle of equality of votes, under Article 45 of the Constitution, as they accorded a different value to the vote of a first-time candidate, by comparison with somebody standing as candidate for a second time. They also violated the autonomy of the institutions of higher education.

The Conference of Rectors is a collegiate independent body of governing authorities of public and private institutions of higher education which conducts activities in the field of development, coordination and research of higher education. The Conference, which basically has the character of a membership organisation, expresses opinions in the course of its activities on issues of respect for the autonomy of institutions of higher education, or on any other problem where it deems it necessary. It also maintains relations with homologue associations in order to promote university exchanges to assist with the progress of higher education and scientific research.

II. The purpose of the autonomy of the university is the preservation of the freedom of science, research and teaching, as well as the protection of researchers and professors from political influences, starting from the premise that science and teaching can only exist and bring about progress when they are free and independent.

It is closely related with the principle of academic freedom, which is an expression of the efforts to protect the freedom of scientific thinking of those involved in research and teaching. The autonomy of the university is the essence of self-government, necessary for an effective decision-making process of institutions of higher education in the performance of their academic and educational duties.

The principle of the autonomy of the university requires that universities should be responsible and transparent in their decision-making and in control of their funds. This can be realised through supervision of the activities of universities by organisations with responsibility for such activity, but such supervision should be performed without violating their autonomy, provided by Article 57.7 of the Constitution.

The autonomy of the university should be developed in order to encourage and assist in the development of education and science. Its basic elements cannot be limited. Certain other restrictions may be imposed, provided they are legitimate and in accordance with constitutional standards.

Article 64.2 of the Law no. 9741 of 21 May 2007 allows the Ministry of Education and Science to overturn any act issued by the authorities or governing bodies of institutions of higher education,

where such acts come into conflict with this law. The Constitutional Court noted that the principle of autonomy of institutions of higher education could not be guaranteed if the supervision of the Ministry of Education and Science was exercised in the manner contemplated by the above provisions. The repeal of acts which are considered unlawful by the Minister or Ministry of Education and Science, as expressed in the law, places universities under the hierarchical control of executive power, as if they were subordinate to the Minister. Thus, instead of being a safeguard for the constitutional principle of the autonomy of institutions of higher education, the law becomes an instrument that violates it through the intervention of executive bodies.

Since higher education is a public service, the law may give bodies of the executive power controlling competencies over the universities. These competencies should, however, be balanced and proportionate, so that their exercise does not violate the autonomy of institutions of higher education which is the essence of self-government and contributes to the positive development of bilateral relations.

The Constitutional Court accordingly held that Article 64.2 of Law no. 9741 of 21 May 2007 on higher education in the Republic of Albania should be repealed because it violates the principle of the autonomy of the university under Article 57.7 of the Constitution.

#### *Languages:*

Albanian, English (translation by the Court).



#### *Identification:* ALB-2010-2-002

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 24.07.2009 / **e)** 25/09 / **f)** Abrogation law / **g)** *Fletore Zyrtare* (Official Gazette) / **h)** CODICES (Albanian, English).

#### *Keywords of the systematic thesaurus:*

2.2.2.1 Sources – Hierarchy – Hierarchy as between national sources – **Hierarchy emerging from the Constitution.**

#### 3.1 General Principles – **Sovereignty.**

4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**

#### *Keywords of the alphabetical index:*

Referendum, constitutional, right to request / Constitution, amendment.

#### *Headnotes:*

The nature of the Constitution and the concept of constitutionality indicate that the Constitution cannot have internal contradictions. Consequently, its dispositions cannot be taken out of context and interpreted separately.

The stability of the Constitution is a constitutional value, and one of the features that distinguish constitutional normative regulation from other legal acts.

In a constitutional state, the concept of a power which does not face limitations and obligations based on the Constitution is unacceptable. The sovereignty of the people established in the framework of a constitutional legal system cannot be mistaken for the constituent power. It is perfectly compatible with popular sovereignty to require that its exercise must follow specific procedures.

#### *Summary:*

I. A group of twenty four electors filed with the Central Election Commission (the CEC) an application to commence the process of conducting a general referendum for the repeal of Articles 5, 7 and 8 of the Law no. 9904 of 21 April 2008 “On some amendments in Law no. 8417 of 21 October 1998 “Constitution of the Republic of Albania” amended”.

The CEC declined to discuss the Initiator Group’s application, on the basis that it concerned the “constitutional referendum” according to Article 122 of the Electoral Code and not the “general referendum” provided for by Article 126 of the Electoral Code and represented by the appellants. The application could not, therefore, be the object of examination by CEC.

The Initiator Group then lodged an application with the Constitutional Court, claiming that the decision by the CEC was due to an unfair process of law, which resulted in the breach of the constitutional right to conduct a referendum.

II. In order to assess the interest of the appellant in this constitutional judgment, the Court began with an examination of the question of whether the direct participation of the people in the constitution-making process is limited to the possibilities offered by the specific provisions of Article 177 of the Constitution, or whether direct participation could also be organised under the general provision of Article 150 of the Constitution.

The Court stressed that every provision of the Constitution should be interpreted in order to be compatible with the fundamental constitutional principles, because all the norms and constitutional principles constitute a harmonic system.

Thus, if Article 150 of the Constitution is also applied to other legislation dealing with amending the Constitution, the case cannot be examined without taking in consideration Article 177 of the Constitution. Under this article, an approved constitutional amendment can only be the subject of a referendum in two circumstances. The first is when the proposed amendment is approved by at least two-thirds of the members of the Assembly (Article 177/4); the second is when this is requested by at least one-fifth of the members of the Assembly (Article 177/5). As Article 177 of the Albanian Constitution is the specific provision on amending the Constitution, it should be presumed that it also covers the possibilities of organising a constitutional referendum on an amendment to the Constitution. According to Article 177 of the Constitution, a constitutional amendment is only submitted to a referendum in cases when the above mentioned subjects request it. This is not obligatory. Article 177 of the Constitution does not provide for the right of 50 000 citizens entitled to vote to request a referendum for the repeal of a constitutional amendment. This means that the direct involvement of the people in the constitution-making process is only possible in co-operation with their representatives in the Assembly.

The Court emphasised that the Constitution as the highest law in the Republic of Albania should be stable. The stability of the Constitution is one of the features that distinguish constitutional normative regulation from other legal acts. The stability of the Constitution is a constitutional value.

In the opinion of the Constitutional Court, this stability could be undermined if a constitutional provision, which was approved by a two-thirds majority, and which was not submitted to a referendum by the subjects listed in Article 177 of the Constitution, could be abrogated in a referendum organised on the initiative of 50,000 citizens. Under the Constitution, a minority of one-fifth of the members of the Assembly,

who do not agree with the majority, can call for a constitutional amendment approved by two-thirds of the members to be submitted to a referendum. The Constitution does not envisage that all constitutional amendments will require a referendum; this will only be necessary in the absence of broad political consensus. Article 177 of the Constitution also provides sufficient guarantees for the opposition (one-fifth of the members) without having recourse to the provisions of Article 150 of the Constitution.

The Court noted the reference the appellant had made, in support of its claim, to the theory of people's sovereignty, according to which the people face no limitation and are not bounded by constitutional provisions in order to exercise sovereignty. It stressed that in a constitutional state, the idea of a power unconstrained by limitations and obligations based on the Constitution is not acceptable. The sovereignty of the people established in the framework of a constitutional legal system cannot be mistaken for the constituent power and it is perfectly compatible with popular sovereignty to require that its exercise must follow specific procedures. It is true that according to Article 2.1 of the Constitution, "sovereignty in the Republic of Albania belongs to the people". However, a constitutional article must be interpreted in the context of the constitution as a whole and not in isolation. The following paragraph of the same Article states that "the people exercise sovereignty through their representatives or directly. A literal and historical interpretation of this paragraph led the Constitutional Court to the conclusion that the legislator has expressed a clear preference in favour of representative democracy. From this viewpoint, the instruments of direct democracy are not considered as a "concurring authority" to the representative organs, but rather as instruments to guard against inactivity on the part of the representatives. The referendum as an instrument of the direct democracy is not an alternative for the law-making process of the Assembly. It does not make laws. This is the prerogative of the legislature.

#### *Languages:*

Albanian, English (translation by the Court).



# Armenia

## Constitutional Court

### Statistical data

1 May 2010 – 31 August 2010

- 119 applications have been filed, including:
  - 23 applications, filed by the President
  - 4 applications, filed by ordinary courts
  - 6 applications, filed by the Defender of Human Rights
  - 86 applications, filed by individuals
- 37 cases have been admitted for review, including:
  - 22 applications, concerning the compliance of obligations stipulated in international treaties with the Constitution
  - 4 applications, filed by ordinary courts
  - 3 applications, filed by the Defender of Human Rights
  - 8 individual complaints, concerning the constitutionality of certain provisions of laws
- 25 cases heard and 25 decisions delivered (including decisions on applications filed before the relevant period), including:
  - 7 decisions on individual complaints (on applications filed before the relevant period)
  - a decision on 2 applications, filed by an ordinary court (the application was filed before the relevant period)
  - 17 decisions concerning the compliance of obligations stipulated in international treaties with the Constitution (on applications filed before the relevant period)

### Important decisions

*Identification:* ARM-2010-2-002

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 13.04.2010 / **e)** DCC-873 / **f)** On the conformity with the Constitution of Article 118 and 118.6 of the Code of Administrative Procedure / **g)** to be published in *Tegekagir* (Official Gazette) / **h)**.

*Keywords of the systematic thesaurus:*

4.7.7 Institutions – Judicial bodies – **Supreme Court**.  
5.3.13.1.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Litigious administrative proceedings**.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction**.

*Keywords of the alphabetical index:*

Cassation appeal, imperfection, correction, right / Cassation, admissibility, conditions.

*Headnotes:*

If the legislator deemed it necessary to establish a specialist Administrative Court with one judicial instance and provided that appeals against acts of the Administrative Court could only be filed with the Court of Cassation, the integrity and efficiency of the appeal system, including the specific aspects of the admissibility of the cassation appeals and the trial on merits, should be guaranteed in accordance with those institutional solutions.

*Summary:*

I. An individual complainant asked the Constitutional Court to assess the issue of the constitutionality of Article 118 and 118.6 of the Code of Administrative Procedure. The complainant suggested that these provisions were out of line with Articles 18 and 19 of the Constitution, due to incomplete provision for access to the Cassation Court, and its efficiency, within the two-instance administrative procedural system.

II. The Constitutional Court observed that points 1 and 2 of the first part of the disputed Article 118.6 of the Code of Administrative Procedure provided for legal regulations, which are inherent to the three-instance civil procedural system, while in determination of the admissibility requirements of the cassation appeals within the two-instance administrative justice system, the guarantees of accessibility to the Cassation Court and of the realisation of the right to effective appeal should prevail. The institutional status of the Cassation Court



as the highest body within the system of general jurisdiction courts cannot prejudice the full and complete implementation of its power vested by the law, as well as the effective realisation of the right to appeal to the Cassation Court. If the legislator deemed it necessary to establish a specialist Administrative Court with one judicial instance and provided that appeals against acts of the Administrative Court could only be filed with the Court of Cassation, the integrity and efficiency of the appeal system, including the specific aspects of the admissibility of the cassation appeals and the trial on merits, should be guaranteed in accordance with those institutional solutions.

The Constitutional Court stated that the provisions under challenge could not provide for such admissibility requirements for the cassation appeal, and this could impinge upon the realisation of the right to appeal. The requirements could not be justified by the status of the Court of Cassation.

Article 118.6 of the Code of Administrative Procedure provided as one of the requirements for the admissibility of a cassation appeal the existence of a breach of material or procedural law, resulting in the incorrect resolution of the case. The Constitutional Court assessed this requirement within the interpretation given in law-enforcement practice and held that the establishment of the fact that judicial error has resulted in the incorrect resolution of a case does not concern as such the admissibility requirement of an appeal and cannot be stipulated within the Code of Administrative Procedure as an admissibility requirement. The establishment of such a fact may take place at trial stage, in compliance with all the requirements of justice. The Cassation Court does not have the power to assess the existence of this type of judicial error at the stage of the admissibility of the cassation appeal, as the determination of this issue at the admissibility stage predetermines the outcome of the trial.

The Constitutional Court held that the legislation did not ensure the completeness of the institution of appeal against Administrative Court acts.

#### *Languages:*

Armenian.



## Austria Constitutional Court

### Important decisions

*Identification:* AUT-2010-2-002

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 15.06.2009/ **e)** B 1682/07 / **f)** / **g)** *Findings and decisions from the Constitutional Court* (Official Digest) / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

5.3.14 Fundamental Rights – Civil and political rights – ***Ne bis in idem***.

*Keywords of the alphabetical index:*

Disciplinary proceedings / *Ne bis in idem*.

*Headnotes:*

The imposition of disciplinary sanctions for the violation of a physician's duty of scrupulous patient-care due to medical malpractice during childbirth despite the occurrence of exceptional indicators is not in breach of constitutionally-guaranteed rights, neither is it in breach of Article 4 Protocol 7 ECHR.

*Summary:*

I. The Disciplinary Division of the Austrian Medical Association found the applicant guilty of having breached his duty of scrupulous patient care pursuant to Section 136.1.2 in conjunction with Section 49.1 of the Austrian Medical Profession Act (hereinafter, the "ÄrzteG") and was subjected to the disciplinary measure of written reprimand. The applicant was accused of having reacted incorrectly to the occurrence of exceptional indicators during childbirth in his capacity as physician in charge. Such conduct constitutes malpractice and is subject to disciplinary procedure.

The applicant's appeal was dismissed by the competent appellate authority, the Disciplinary Senate of the Austrian Medical Association. Based on expert testimony given at the preceding criminal proceedings, the Disciplinary Senate found that the

applicant, as physician in charge, had not identified the need for an emergency caesarean section – although the circumstances of the birth had indicated one – and this resulted in the death of the unborn child. It was acknowledged that it is sometimes difficult even for experienced physicians to determine whether pain occurring during childbirth is a normal side-effect or is already being caused by a crisis situation. Nonetheless, adherence to the obligation of scrupulous patient care arising from Section 49.1 of the *ÄrzteG* – which includes the duty to monitor all potential risks at all times – requires careful assessment. The Disciplinary Senate therefore noted that the actual malpractice was the misinterpretation of the indicators in their entirety rather than misjudgement as to the need for an emergency section.

The Disciplinary Senate also observed that the Higher Regional Court of Appeal of Linz found the applicant guilty of killing by negligence pursuant to Section 80 of the Austrian Criminal Code (StGB). In the opinion of the Disciplinary Senate, Article 4 Protocol 7 ECHR had not been breached, as one of the fundamental purposes of medical disciplinary law is a public display by the medical profession of their willingness to prevent all influences that are detrimental to the social acceptance of medical professionalism. The significance of the present case required the professional community to distance itself firmly from the applicant's conduct.

II. The applicant then filed an application with the Austrian Constitutional Court pursuant to Article 144 Federal Constitution Act, alleging a violation of his constitutionally guaranteed rights to a fair trial under Article 6 ECHR and of his right not to be prosecuted twice under Article 4 Protocol 7 ECHR.

With regard to Article 6 ECHR the applicant argued that a physician can judge a situation from an *ex-ante* point only and therefore cannot foresee events. The Disciplinary Senate had also failed to take exculpatory evidence into account and to assess the somewhat meandering course of the expert witness's reasoning at the first and the second instance of the criminal proceedings. It had also wrongfully failed to call in another expert.

Referring to Article 4 Protocol 7 ECHR the applicant claimed that the principle of "*ne bis in idem*" also applies to disciplinary proceedings, so that a legally effective sanction precludes a further prosecution based on the same conduct. The allegations made by the Disciplinary Division correlate to the observations made by the second criminal instance. The disciplinary and the criminal proceedings therefore both dealt with the same breach of the duty of

scrupulous patient care. Whilst acknowledging the legitimate interest of the professional community to react from a disciplinary standpoint to serious criminal convictions, the applicant argued that this was the case here. This, coupled with the absence of any justification as to the extent of the need for disciplinary sanctions in addition to criminal sanctions violated the applicant's guaranteed rights under Article 4 Protocol 7 ECHR.

III. Turning to the applicant's allegations under Article 6 ECHR, the Constitutional Court began by reviewing the relevant case law. An arbitrary act interfering with constitutionally guaranteed rights starts with a cumulative misjudgement of the legal situation, continues with the omission of any purposeful investigation and is compounded by a total lack of preliminary proceedings. Examples would include the deliberate disregard of allegations made by parties to the proceedings, careless abandonment of the content of the file or disregard of the facts of the case (*VfSlg* 8808/1980, 14.848/1997, 15.241/1998, 16.287/2001, 16.460/2002). The Constitutional Court found the disciplinary proceedings to be consistent with the law and concurred with the Disciplinary Senate's conclusion that the culpable malpractice lay in the misinterpretation of the indicators, with its alarming consequences. It also pointed out that the expert opinion and the resulting inconsistencies were under consideration in the appellate proceedings; the fact that another expert had not been appointed and heard did not, *per se*, constitute a relevant mistake under constitutional law.

The applicant had also alleged a breach of his constitutionally guaranteed right not to be prosecuted twice. The Constitutional Court referred to its relevant case law which states that in principle, the law allows professional bodies to subject behaviour detrimental to their reputation to special disciplinary sanction (*VfSlg* 15.543/1999). In its decision *VfSlg* 17.763/2006 it held that it is a legitimate aim of a professional body to reserve the right to impose disciplinary sanctions in cases of criminal conviction of conduct that may bring the profession into disrepute or pose a threat to the proper performance of duties characteristic of the profession in question. In the Constitutional Court's view, this "disciplinary overhang" fell into a category of its own, punishment of which violated neither Article 6 ECHR nor Article 4 Protocol 7 ECHR. Section 49.1 of the *ÄrzteG* defines the duties of physicians that are essential for the reputation of the medical profession. The Constitutional Court noted that if the conduct of a physician is capable of destroying the confidence of the population in scrupulous patient care, it is in the specific interest of the medical profession to institute proceedings for reasons of general deterrence. As

this particular disciplinary aspect was not considered in the criminal proceedings, the fact that the applicant had to answer to disciplinary authorities as well as criminal authorities did not give rise to a breach of his rights under Article 4 Protocol 7 ECHR.

IV. The Constitutional Court held that the alleged breach of constitutionally guaranteed rights did not occur. Moreover, it did not find that any of the applicant's other constitutionally guaranteed rights had been breached, neither had any harm resulted to him by the application of an unlawful general legal norm.

#### *Languages:*

German.



#### *Identification:* AUT-2010-2-003

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 17.12.2009 / **e)** B 446/09 / **f)** / **g)** *Findings and resolutions from the Constitutional Court* (Official Digest) / **h)** CODICES (German).

#### *Keywords of the systematic thesaurus:*

5.3.14 Fundamental Rights – Civil and political rights  
– ***Ne bis in idem***.

#### *Keywords of the alphabetical index:*

Disciplinary proceedings / *Ne bis in idem*.

#### *Headnotes:*

Where an administrative penalty was imposed for a contravention of the professional duties of physicians laid down in the Austrian Medical Profession Act by intrusive or blatant promotion of Botox-treatment, this was not in breach of constitutionally guaranteed rights. The principle of *ne bis in idem* came into question here, in terms of the imposition of a disciplinary sanction pursuant to the disciplinary regulations concerning the same conduct.

#### *Summary:*

I. In December 2004 the applicant, a dentist and dental surgeon, launched an advertising campaign. A leaflet was distributed as an attachment to an advertisement for a supermarket chain. It promoted inexpensive Botox-treatment, stating in highlighted letters “If you want to be beautiful, you must hurry! Botox-treatment by Dr. P at sensational prices for the first 100.” The leaflet contained photographs of the applicant and the price of the special offer by comparison to the alleged average market price of the treatment.

On 1 June 2005 the Disciplinary Division of the Austrian Medical Association found the applicant guilty of having impaired the reputation of the medical profession under Section 136.1.1 of the Austrian Medical Profession Act (the “*ÄrzteG*”) by blatant and unsubtle advertising and of having breached his duty of scrupulous patient-care pursuant to Section 136.1.2 in conjunction with Section 49.1 of the *ÄrzteG* by the complete omission of information as to complications that might arise from Botox-treatment.

On 5 December 2005 (the decision was served on the applicant on 27 February 2009) the applicant's appeal was granted in part with regard to the latter charge because the competent appellate authority, the Disciplinary Senate of the Austrian Medical Association did not find sufficient evidence. It was, however, dismissed with regard to the first charge. The Disciplinary Senate found that the inclusion of the advertisement in supermarket advertising could hardly be understated in its commercially-dominated focus. The applicant argued that Section 53.1 of the *ÄrzteG* regulating advertising by physicians did not contain sufficiently clear provisions and could not satisfy the principle of clarity and precision under Article 7 ECHR. This argument took no account of the Constitutional Court's established case law, according to which problems with precision and clarity can be eliminated by appropriate and settled professional codes of conduct and judicial case-law. There was no need for further examination of the compliance of this kind of advertisement with the rules governing the medical profession. A physician who incites his patients to participate in a competition for special prices falls below the appropriate standards. This should be apparent to all physicians, irrespective of the availability of disciplinary case-law.

In its judgment of 22 January 2007 the Vienna City Authority imposed an administrative penalty and a fine of 630 € on the applicant for having violated Section 199.3 in conjunction with Section 53.1 of the *ÄrzteG* and with Articles 1 and 3.c/d of the Guidelines of the Austrian Medical Association concerning the

behaviour of physicians in public. The guidelines prohibit the distribution of subjective or incorrect information as well as information which could bring the medical profession into disrepute. The applicant's appeal was granted in part by the Vienna Independent Administrative Panel, which reduced the fine to 510 €.

II. The applicant subsequently filed an application with the Austrian Constitutional Court pursuant to Article 144 of the Federal Constitutional Law, alleging the violation of his constitutionally guaranteed rights, in particular a breach of the principle of "*ne bis in idem*".

III. The Constitutional Court began by reiterating its case-law which qualifies certain heavy disciplinary sanctions as punishments in the sense of Article 6 ECHR, so that the most severe legal consequence the law provides is decisive, rather than the sanction imposed in a specific case (*VfSlg* 11.506/1987, 11.569/1987, 15.543/1999, 15.867/2000, 17.710/2005, see also European Court of Human Rights, *Engel et al*, 08.06.1976). Disciplinary offences that carry such a severe punishment must be seen as punishable crimes according to Article 4 Protocol 7 ECHR.

The Constitutional Court then examined the relevant provisions of the *ÄrzteG*, pointing out that from a disciplinary perspective, the elements of the offence in Section 136.1.1 comprised medical misconduct which was also covered by the administrative prohibition in Section 53.1. When dealing with misconduct falling within the definitions of both offences the competent authorities must ensure that no infringement of Article 4 Protocol 7 ECHR occurs.

Regarding the constitutional boundary established by Article 4 Protocol 7 ECHR, the Constitutional Court referred to a previous judgment (*VfGH*, 05.12.1996, G9/96 *et al*). The boundary mentioned above prohibits the prosecution of an offence if the relevant conduct has already been the subject of criminal proceedings. This applies if the offence in question completely covers the wrongfulness and guilt of the offender's misconduct, so that no necessity for additional prosecution remains. Simultaneous prosecution and punishment of different offences violates the principle of *ne bis in idem* if they effectively cover the same conduct.

The Constitutional Court made reference to another judgment (*VfGH* 02.07.2009, B 559/08), dealing with the development of the relevant case-law of the European Court of Human Rights. Referring to the "*travaux préparatoires*" the Constitutional Court laid down that Article 4 Protocol 7 ECHR does not generally prohibit competing responsibilities and

prosecutions aside from criminal law. The Austrian explanation given on the occasion of the ratification of Protocol 7 ECHR would clarify and strengthen this argument. Both the Austrian representatives and the other bodies involved in the ratification process had in mind the compatibility of prosecution under the criminal law on the one hand and under disciplinary and administrative law on the other.

The Constitutional Court accordingly arrived at the following conclusion. The competent administrative authorities fined the applicant for having distributed information detrimental to the reputation of the medical profession according to Section 199.3 in conjunction with Section 53.1 of the *ÄrzteG* and with Articles 1 and 3.c/d of the Guidelines. The disciplinary bodies of the Austrian Medical Association found him guilty of having brought the reputation of the medical profession into disrepute under Section 136.1.1 of the *ÄrzteG* and they too imposed a fine. The applicant had therefore been prosecuted and punished twice for the same conduct – namely bringing the medical profession into disrepute. The Disciplinary Senate had disregarded the fact that conduct penalised through Section 136 of the *ÄrzteG* can correspond to conduct already punished under Section 53 of the *ÄrzteG*.

IV. According to the Constitutional Court the imposition of a disciplinary sanction constituted a violation of the constitutional right not to be prosecuted and punished twice.

#### *Languages:*

German.



# Azerbaijan

## Constitutional Court

### Important decisions

*Identification:* AZE-2010-2-001

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 09.07.2010 / **e)** / **f)** / **g)** Azerbaijan, *Respublika, Khalq gazeti, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law.**

5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**

*Keywords of the alphabetical index:*

Right to personal liberty / Freedom, deprivation, measure.

*Headnotes:*

A court of first instance had, of its own initiative, substituted house arrest for arrest as a measure of restriction.

The Constitution guarantees a universal right of personal liberty, which may only be restricted as specified by law, by way of detention, arrest or imprisonment.

*Summary:*

A district court in Baku City decided on 28 January 2010, under Article 206.1 of the Criminal Code to place the accused under arrest as a measure of restriction for a period of two months. The Court, by its own initiative, changed the given measure of restriction to house arrest.

In its decision, the Court made reference to the Criminal Procedure Code (hereinafter, the “CPC”).

The judicial board on cases of administrative offences of the Appeal Court of Baku City asked the

Constitutional Court for an interpretation of Article 157.5 of the CPC, from the perspective of the requirements of Articles 154.4, 156.2 and 163.2 of the CPC, in view of the availability in judiciary practice of different approaches as to the question of replacement of arrest by house arrest, at the initiative of the Court or on the basis of a petition of advocacy. In order to determine the question, the Constitutional Court considered explain the essence of the measure of restriction, and the positions of Articles 154, 156, 157, 163 and 164 of the CPC on measures including arrest and house arrest, and the order of consideration of these measures by courts.

The Constitution provides that everyone has the right to personal liberty, and that this can only be restricted as specified by law, by way of detention, arrest or imprisonment.

The universal right to personal liberty and the right to personal immunity are also enshrined in the international acts devoted to the rights and freedom of the person, including Article 3 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Civil and Political Rights and Article 5 ECHR.

The Court emphasised that in cases of deprivation of liberty, it is particularly important that the general principle of legal certainty be satisfied. A clear definition of the conditions for deprivation of liberty under domestic and/or international law is essential, and the law itself must be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention.

Criminal procedure legislation, which is based on constitutional requirements and international legal acts, has established the legal procedures governing criminal prosecution and the defence of suspects or accused persons as provided for by criminal law (Article 1.1 of the CPC). Under criminal procedure legislation, the right to liberty may only be restricted in cases of detention, detention on remand or imprisonment in accordance with the law (Article 14.1 of the CPC).

The types of measures of restrictions are specified in Article 154.2 of the CPC. It is evident from the content of this article, and that of Article 154.3 and 154.4 of the CPC, that measures such as arrest, house arrest or bail may only be applied to an accused person. Other measures of restriction may be applied both to accused and to suspected persons.

Criminal procedure legislation has established that house arrest and bail may serve as alternatives to arrest and can be applied in its place once a court

decision has been made to arrest the accused (Article 154.4 of the CPC). From this position, it follows that the basis of application of house arrest as a measure of restriction is identical to the basis of application of a measure of restriction in the form of arrest. Consequently, when a measure of restriction is being chosen, the requirements of Article 155.1-155.3 of the CPC should be strictly observed.

In the view of the Constitutional Court, the requirements of Articles 154.4, 156.2 and 163.2 of the CPC should also be strictly observed when Article 157.5 of the CPC is being applied. When deciding upon a measure of restriction, the Court may substitute house arrest for arrest at the request of the defence if, in its opinion, there is no need to isolate an accused person from society by detaining him or her on remand.

#### *Languages:*

Azeri (original), English (translation by the Court).



## Belarus Constitutional Court

### Important decisions

*Identification:* BLR-2010-2-004

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 23.05.2010 / **e)** D-450/2010 / **f)** On the exercise of the right to judicial appeal by those under sentence of arrest, confinement, life imprisonment / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2010 / **h)** CODICES (English, Belarusian, Russian).

*Keywords of the systematic thesaurus:*

3.13 General Principles – **Legality.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

*Keywords of the alphabetical index:*

Convicted person / Appeal, procedure / Omission, legislative, partial.

*Headnotes:*

The Constitutional Court drew attention to a gap in a legal regulation regarding appeal proceedings by detainees and persons under administrative arrest against disciplinary sanctions, which does not ensure the full exercise of the constitutional right of citizens to access to justice. It suggested that the Council of Ministers enact draft legislation, making the necessary changes and additions to the Civil Procedure Code.

*Summary:*

The right to judicial appeal arising from sentences of detention, arrest and life imprisonment by detainees and persons under administrative arrest against disciplinary sanctions is enshrined in special laws. It is an important safeguard for persons in this category, protecting against breaches of their rights. The possibility of an appeal also promotes lawfulness in the implementation of criminal sanctions, administrative arrest and custodial detention, and is in line with

the international legal instruments to which the Republic of Belarus is a party. These include the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The appeal procedure is also in conformity with the Constitution. Article 60 of the Constitution guarantees everyone's protection of the rights and liberties by a competent, independent and impartial court of law within the time period specified in law. Under Article 21.3 of the Constitution, the state shall guarantee the rights and liberties of the citizens of Belarus that are enshrined in the Constitution and the laws, and specified in the state's international obligations.

The problem was that the legislator did not define the procedure for appeal against applied sanctions by those actually in detention.

The Constitutional Court drew attention to a gap in legal regulation regarding appeal proceedings arising from sentences of detention, arrest and life imprisonment by detainees and persons under administrative arrest against disciplinary sanctions which does not ensure the full exercise of the constitutional right of citizens to access to justice. It noted the necessity to remedy the gap, so that full provision was made for appeal proceedings made by those already in detention. It proposed that the Council of Ministers should prepare draft legislation making the necessary changes and additions to the Civil Procedure Code.

#### *Languages:*

Belarusian, Russian, English (translation by the Court).



#### *Identification:* BLR-2010-2-005

**a)** Belarus / **b)** Constitutional Court / **c)** / **d)** 04.06.2010 / **e)** D-451/2010 / **f)** On the conformity with the Constitution of the Law on Making Alterations and Addenda to Certain Laws on the Prevention of Legalisation of Proceeds from Crime and Financing of Terrorist Activities / **g)** *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2010 / **h)** CODICES (English, Belarusian, Russian).

#### *Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality.**

3.23 General Principles – **Equity.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

#### *Keywords of the alphabetical index:*

Terrorism, fight / Financial control / Legislative procedure.

#### *Headnotes:*

Restrictions on constitutional rights should be legally admissible and socially justified. They should satisfy the requirement of equity, and be adequate and commensurate. They should also protect constitutional values. In cases where the constitutional rules allow the legislator to impose restrictions on rights and freedoms they should not negate the essence of constitutional rights and freedoms.

The right of property may be restricted by the legislator to the extent required by the principle of proportionality in the context of restriction of rights and freedoms.

Regarding the duty to identify the parties to a financial transaction, where the legislature is establishing a legal mechanism with the aim of preventing the legalisation of proceeds from crime and to block the financing of terrorism, it is entitled to prescribe measures which will stop these activities, identify the physical and legal persons committing them and oblige those performing financial transactions to disclose the identity of the parties to financial transactions.

#### *Summary:*

The Law on Making Alterations and Addenda to Some Laws on the Prevention of Legalisation of Proceeds from Crime and Financing of Terrorist Activities prescribed various measures aimed at preventing the legalisation of proceeds from crime and blocking the financing of terrorism. This represents one of the ways of performing tasks as a sovereign state ruled by law; tasks aimed at ensuring legality and law and order (Article 1.3 of the Constitution). The above measures are taken in order to create the domestic and international order necessary for the full exercise of the rights and liberties of the citizens (Article 59.1 of the Constitution).

The Constitutional Court emphasised that the alterations and addenda to the content of several normative legal acts (Law on Measures to Prevent Legalisation of Ill-Gotten Proceeds and Financing of Terrorist Activities, Law on Currency Regulation and Currency Control, Law on Fighting Corruption, Law on Fighting Organised Crime and the Banking Code) are designed to comply with strategic international conventions on combating terrorism.

Article 1.5 and 1.7 of the Law prescribe the disclosure of the identity of the parties to a financial transaction (by ascertaining the surname of a physical person, his proper name and, if applicable, his patronymic, his citizenship, date and place of birth, place of temporary or permanent residence, the requisite elements of an identity document and taxpayer identification number). The Constitutional Court considered that these articles impose a degree of restriction on the rights and freedoms of the individual and the citizen stipulated in Article 28 of the Constitution (universal entitlement to protection against unlawful interference with one's private life, including encroachments on the privacy of correspondence and telephonic and other communications, and on personal honour and dignity).

Having also examined the provisions of Article 23 of the Constitution the Constitutional Court took the view that as the purpose of the Law is the protection of the individual, society and the state through measures preventing legalisation of proceeds from crime and financing of terrorism, the legislator is entitled to prescribe measures with a view to curtailing such activity or finding out who is carrying it out. The legislator may also oblige those carrying out financial transactions to disclose the identity of the parties to them.

The provisions of the Law under dispute set out the duties of those carrying out financial transactions to suspend them, to find out the beneficial owners of parties to these transactions (in the case of organizations, whether any written agreements have been concluded), and to find out whether any Peps (politically exposed persons) from foreign states and international organisations are parties to a financial transaction. They can refuse to proceed with a transaction or to register it if the requisite identification documents or data are not provided. These provisions impose restrictions on the right to property (Articles 13 and 44 of the Constitution) and the right of the citizen to seek recompense, through the courts, for damage to property and moral injury (Article 60 of the Constitution). They also affect the system of principles that define and regulate civil relations, in particular freedom of contract and inadmissibility of arbitrary interference in private affairs (Article 2.2 of the Civil Code).

The Constitutional Court also noted Article 23.1 of the Constitution (which allows for a degree of restriction by law of rights and freedoms) and Article 44.6 (the exercise of the right of property shall not be contrary to social benefit and security, or be harmful to the environment or historical and cultural treasures, or infringe upon the rights and legally protected interests of others). It concluded that the right of property may be restricted to the extent required by the principle of proportionality.

The legal position formulated in the Message of the Constitutional Court on Constitutional Legality in the Republic of Belarus, 2009 states that restrictions on constitutional rights should be legally admissible and socially justified; they should meet the equity requirements and be adequate, commensurate and necessary in order to protect constitutional values.

In cases where constitutional rules permit the legislator to impose restrictions on rights and freedoms they should not negate the essence of constitutional rights and freedoms.

Therefore, although it is true to say that the suspension of or refusal to proceed with a financial transaction and other restrictions provided for by the Law affect the constitutional right to property of the parties to a financial transaction, these measures are lawful and admissible provided that they are established by law and are commensurate with the legitimate aim being pursued.

By allowing for such restrictions, the legislator is creating one of the prerequisites for preventing the legalisation of proceeds from crime and the financing of terrorist activities, thereby safeguarding national security, social order, morals and public health, as well as the rights and freedoms of others.

#### *Languages:*

Belarusian, Russian, English (translation by the Court).





*Identification:* BLR-2010-2-006

a) Belarus / b) Constitutional Court / c) / d) 22.06.2010 / e) D-462/2010 / f) On the conformity with the Constitution of the Law on the Support of Small and Medium Enterprise / g) *Vesnik Kanstytucijnaga Suda Respubliki Belarus* (Official Digest), no. 2/2010 / h) CODICES (English, Belarusian, Russian).

*Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

*Keywords of the alphabetical index:*

Freedom of contract / Freedom of enterprise / Commercial freedom, restrictions / Right to property / Legislative procedure.

*Headnotes:*

Support of the subjects of small and medium enterprises is not contrary to the principle of universal equality before the law, provided that the legal means used to achieve this support are reasonable and proportionate to the protected values and goals. Interference by state authorities and organisations in the activities of the subjects of small and medium enterprises is allowed, provided that it is based on constitutional rules. Legal regulation of possible restrictions on free entrepreneurship should appear in acts of legislation, meet the requirements of equity, be proportionate to the constitutionally significant purposes and not impede the economic independence and initiative of small and medium enterprises.

*Summary:*

The Law on the Support of Small and Medium Enterprise regulates relations that arise in the support of small and medium enterprise and defines the subjects of the support infrastructure. Certain provisions of the Law state that individual entrepreneurs, micro-organisations and small organisations are the subjects of small enterprise. Subjects of medium enterprises are commercial entities with an average number between one hundred and one and two hundred and fifty employees per calendar year. Subjects of support infrastructure include enterprise support centres and

small enterprise incubators. They were created in order to render assistance to subjects of small and medium enterprise in organising and conducting their business. Other organisations supporting the subjects of small and medium enterprise include the Belarusian Fund of Financial Enterprise Support, institutions which give financial help to entrepreneurs and mutual credit societies for small and medium enterprise.

The Constitutional Court started its review of the constitutional compliance of the Law from the standpoint of Article 13 of the Constitution. This provides that the most favourable conditions for the functioning of the economic system as a whole should be created in the state. It implies the need to foster entrepreneurship as a cornerstone of the economy.

The constitutional principles of equal rights to conduct economic and other activities, guarantees of equal protection and equal conditions for the development of all forms of ownership, and the universal right to own, enjoy and dispose of property, individually or jointly with other persons (see Articles 13 and 44) have been developed within the Law under dispute.

The Court noted that support for the subjects of small and medium enterprise does not contravene the principle of universal equality before the law. The equality principle does not preclude variations in the legal regulation of the participants of civil circulation (measures of material support for the subjects of small and medium enterprise), provided that the legal means used to achieve it are reasonable and proportionate to protected values and goals.

However the second part of Article 5 of the Law provides that interference by state authorities and other organisations in the activities of the subjects of small and medium enterprise and support infrastructure is only permissible provided it is based on legal rules and is in the interests of national security, public order, protection of public morals and public health and the rights and freedoms of other persons.

In this connection the Constitutional Court noted that, according to Article 23.1 together with Articles 13 and 44 of the Constitution, the legal regulation of possible restrictions on free entrepreneurship and on the right to own and dispose of property should appear in acts of legislation, meet the requirements of fairness, be proportionate to the constitutionally significant purposes and not impede the economic independence and initiative of small and medium enterprise.

This approach to the clarification of the meaning of the Law will facilitate a clear understanding and application of the above norm in practice and ensure the constitutionally guaranteed rights of the subjects of enterprise. Norms dealing with individual rights and responsibilities and legal persons should be clear, concise and consistent.

#### *Languages:*

Belarusian, Russian, English (translation by the Court).



## Belgium Constitutional Court

### Important decisions

*Identification:* BEL-2010-2-006

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 23.06.2010 / **e)** 76/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.08.2010 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**

5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel.**

5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

5.3.13.1.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Litigious administrative proceedings.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

#### *Keywords of the alphabetical index:*

Armed forces, discipline, judicial review / Military, discipline / Military, personnel, staff regulations / Military, disciplinary penalty, judicial review.

#### *Headnotes:*

Although those drafting the Constitution, in providing that the rights and obligations of the military are governed by law (Article 182 of the Constitution) and in adopting specific provisions relating to courts martial and the way in which the military can be deprived of their rank, honours and pensions (Articles 157.1 and 186 of the Constitution), themselves established a difference in treatment between the military and servants of other public departments, the legislature must nonetheless observe the rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) when implementing the constitutional provisions relating to the military.

The need to maintain the operational capacity of the Armed Forces cannot justify members of the Armed Forces being deprived of the right to effective judicial review of the disciplinary penalties imposed on them.

### *Summary:*

A preliminary question was referred to the Constitutional Court by the Council of State concerning the compatibility with the rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) of Article 14.1 of the Laws on the Council of State, interpreted as meaning that certain disciplinary penalties imposed on the military were not amenable to annulment by the Council of State, whereas disciplinary penalties imposed on other civil servants were.

The Constitutional Court considered that the rules on equality and non-discrimination must be observed by the legislature when it implements the constitutional provisions on the military under which specific rules apply to them.

According to the case-law of the Council of State, a distinction must be drawn between what are classified as "minor disciplinary penalties" (call to order, reprimand, confinement to barracks, overnight arrest and house arrest) and those which according to the staff regulations constitute "major disciplinary penalties" (suspension or dismissal). Only the latter measures are acts amenable to annulment by the Council of State. According to the Council of State, which relies on statements made while the Law was at the drafting stage, judicial review of the disciplinary penalties imposed on members of the armed forces could undermine the cohesion of the army and the maintenance of its operational capacity.

The Constitutional Court considered that the difference in treatment between the military and civil servants was based on an objective criterion. It had yet to ascertain whether that difference was reasonably justified. The legislature's objective was to maintain the armed forces in a constant state of preparedness to participate effectively in military operations, possibly at extremely short notice. It might have taken the view that such an objective required a particularly well-disciplined approach and that such discipline could not be maintained unless the military superior had the power to react immediately to any disciplinary misconduct.

However, that necessity could not justify the absence of judicial review. The interest safeguarded by the availability of judicial review of disciplinary penalties is as real and legitimate for the military as it is for civil servants. Nor did the Court see how the cohesion and

operational capacity of the armed forces might be undermined because judicial review, which in itself has no suspensory effect, might be introduced.

The Court concluded that, as interpreted in the manner described, the provision in question infringed the constitutional rules. It then proposed a different interpretation which permits judicial review and is therefore compatible with the Constitution. The operative part of the judgment sets out both interpretations.

### *Languages:*

French, Dutch, German.



### *Identification: BEL-2010-2-007*

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 01.07.2010 / **e)** 79/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

### *Keywords of the systematic thesaurus:*

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

3.4 General Principles – **Separation of powers.**

5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

5.3.13.1.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Litigious administrative proceedings.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

### *Keywords of the alphabetical index:*

Legislature, independence / Legislature, appointment / Council of State, powers, legislative assembly / Parliamentary assembly, right of action / Legislative lacuna / Law, application, lacuna, unconstitutionality.

*Headnotes:*

The rule that the legislative assemblies have the widest independence in the exercise of their tasks is one of the basic principles of the democratic structure of the State. That principle has the effect that a legislative assembly must itself be able to regulate the matters entrusted to it, such as appointments, and exercise its powers autonomously.

The interest safeguarded by the establishment of an action for annulment before the Council of State is as real and legitimate for a candidate for appointment (by Parliament) as a serving member of the French-language Committee for the appointment of notaries as a professor of law as for a candidate for appointment to that body (by the National Chamber of Notaries) as a notary.

Since the lacuna which was found is in the text referred to the Court, it is up to the Council of State to put an end to the unconstitutionality found by the Court, since that finding is expressed in sufficiently precise and complete terms to enable the provision in issue to be applied in a way that complies with the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution).

*Summary:*

A preliminary question was referred to the Constitutional Court by the Council of State concerning Article 14.1.2 of the Consolidated Laws on the Council of State, which had been interpreted as meaning that the Council of State would not have jurisdiction to hear and determine an action for annulment by a candidate for a post as member of the French-language Committee for the appointment of notaries as a professor of law on the ground that the appointment of those candidates for the post was a matter for the Parliament. The Council of State asked the Constitutional Court whether that provision was compatible with the rules on equality and non-discrimination and possibly with Article 6.1 ECHR because it treats differently two categories of candidates, since candidates for the same post who are notaries are able to challenge appointments to the post of member of the Committee because those appointments are within the remit of the National Chamber of Notaries, whereas candidates who are not notaries cannot challenge appointments before the Council of State because the appointment of those candidates is made by the Parliament.

The French-language Committee for the appointment of notaries has eight serving members. Four of them are notaries and are appointed by the members of the

General Assembly of the National Chamber of Notaries. The other four members, who include a professor of law, are appointed alternately by the Chamber of Representatives and by the Senate, by a special majority.

Under Article 14.1.1 of the Consolidated Laws on the Council of State the latter has jurisdiction to hear and determine an action for annulment by the candidates in the first category, because the authority making the appointments is an administrative authority. Conversely, the Council of State does not have jurisdiction to hear and determine actions for annulment by candidates in the second category, because the authority making the appointments is a legislative authority and because the Council of State's jurisdiction to hear and determine actions for annulment of the acts of those legislative assemblies is limited to decisions and regulations relating to public contracts and to members of the staff of those assemblies.

The Constitutional Court considered that the rule that legislative assemblies have the utmost independence in the exercise of their task is a basic principle of the democratic structure of the State. Legislative assemblies must themselves be able to regulate the matters entrusted to them, such as appointments, and to exercise their powers autonomously. The Court held, however, that the difference in treatment referred to it was disproportionate by reference to that principle because the interest safeguarded by the initiation of an action for annulment is as real and as legitimate for candidates in the first category as for candidates in the second category. The appointment by the Senate of a serving member of the French-language Committee for the appointment of notaries, as a professor of law, is an act that must be amenable to judicial review by the Council of State.

After drawing a comparison between the appointments procedure at issue and the procedure laid down for appointments to the bodies responsible for the recruitment of judges, the Court concluded that the Council of State, when hearing an action for annulment of this type of appointment by the Senate, must, after ensuring, where appropriate, that the legislative assembly complied with the conditions of appointment fixed by the Constitution or by law, take account of the special relationship of trust reflected in the appointment made by a legislative assembly.

The Court concluded that the provision at issue was incompatible with Articles 10 and 11 of the Constitution in that it did not permit an action before the Council of State. Since the lacuna found was in the text referred to the Court, it was for the Council of State to put an end to the unconstitutionality found by

the Court, since that finding was expressed in sufficiently clear and precise terms to enable the provision to be applied in a way that complied with Articles 10 and 11 of the Constitution.

The reservation which the Court expressed as to the jurisdiction of the Council of State was inserted in the operative part of the judgment.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2010-2-008

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 01.07.2010 / **e)** 80/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

1.6.3.1 Constitutional Justice – Effects – Effect *erga omnes* – **Stare decisis**.

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights**.

5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

5.2 Fundamental Rights – **Equality**.

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts**.

5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote**.

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

#### *Keywords of the alphabetical index:*

Vote, prohibition / Imprisonment, electoral rights, suspension, transitional provision / Effect of judgments, unconstitutionality, scope.

#### *Headnotes:*

Electoral rights, which flow in particular from Protocol 1 ECHR, must, pursuant to Article 14 ECHR

and the constitutional rules on equality and non-discrimination (Articles 10 and 11 of the Constitution), be guaranteed without discrimination. While they are fundamental rights for democracy and the State governed by the rule of law, they are not, however, absolute and may be subject to restrictions.

These restrictions cannot be automatic and general. A decision depriving a convicted person of his electoral rights must be taken by a court, in the light of the particular circumstances, and there must be a link between the offence committed and matters relating to the elections and democratic institutions.

When the legislature amends the law in order to take account of a finding of unconstitutionality by the Court, it cannot, by means of a transitional provision, deprive the judgment of the Court of its legal effects.

#### *Summary:*

A private individual brought an action before the Constitutional Court for annulment of Article 69 of the Law of 14 April 2009 making various amendments in electoral matters.

By the contested law, the legislature wished to respond to the unconstitutionality found in Judgment no. 187/2005 of the Constitutional Court of 14 December 2005. The legislature abolished the system entailing the automatic prohibition of electoral rights which applied in the case of certain convictions and replaced it by an optional system which enabled the court to deprive a convicted person of his electoral rights.

However, the legislature considered it necessary to adopt a transitional measure, in accordance with which this new system was not declared to apply to offenders who had been definitively convicted when the new Law entered into force. It was this transitional measure that was the subject of the action for annulment.

The person concerned raised a single plea, alleging violation of the rules on equality and non-discrimination (Articles 10 and 11 of the Constitution) in conjunction with Article 3 Protocol 1 ECHR, whether or not in conjunction with Article 14 ECHR and with Articles 25.b and 26 of the International Covenant on Civil and Political Rights.

As regards the rights to vote and to be elected, the Court recalled the principles enshrined in its Judgment of 14 December 2005, which already cited the *Hirst* judgment of the European Court of Human Rights. The Court added, relying on the judgment of the European Court of Human Rights, Grand

Chamber, of 8 April 2010 in *Frodl v. Austria*, that the essential objective was to make the deprivation of electoral rights an exception, even in the case of convicted persons serving custodial sentences, by ensuring that such a measure was based on a sufficient statement of reasons set out in an individual decision explaining the reason why, in the circumstances of the case, it was necessary to deprive the person concerned of his electoral rights.

Relying on Articles 8, 61, 64, 67 and 69 of the Constitution, the Court considered that the legislature has the power to determine which citizens are excluded from the right to participate in elections. The contested measure contained a restriction of the electoral rights of those who had been definitively convicted at the time when the law entered into force. It thus created a difference in treatment between offenders.

The Court observed that the legislature had adopted a measure influenced by the desire to bring to an end, in future, the unconstitutionality found by the Court in Judgment no. 187/2005. It added, however, that the contested transitional provision could not have the consequence of depriving Judgment no. 187/2005 of its legal effects. The provision which was applicable before the legislative amendment was therefore incompatible with Articles 10 and 11 of the Constitution in that it automatically deprived convicted persons of their electoral rights. Persons whose electoral rights had been suspended could, where they considered, on the basis of the judgment cited above, that they had been wrongfully removed from the electoral rolls, make use of the complaint procedure provided for by the Electoral Code. If they did not obtain satisfaction, they could appeal to a court, which, under the Organic Law on the Constitutional Court, would have to take account of Judgment no. 187/2005 and declare inapplicable a provision incompatible with Articles 10 and 11 of the Constitution.

In the light of that reservation, the Court dismissed the action.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2010-2-009

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 29.07.2010 / **e)** 90/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette), 25.08.2010 / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest.**

5.2.2.9 Fundamental Rights – Equality – Criteria of distinction – **Political opinions or affiliation.**

5.3.18 Fundamental Rights – Civil and political rights – **Freedom of conscience.**

#### *Keywords of the alphabetical index:*

Fuels, biofuels / Religious freedom, interference, practices.

#### *Headnotes:*

The Court dismissed the complaint (based, according to the applicant, on religious grounds) against the addition of biofuels for the propulsion of motor vehicles. The legislative provision which requires all the oil companies to add a percentage of sustainable biofuels to diesel and petrol is nonetheless reasonably justified, even on the assumption that the contested provision entails an interference with freedom of conscience and religion.

#### *Summary:*

A natural person brought an action before the Court for the annulment of Section 4 of the Law of 22 July 2009, which required oil companies to add a certain percentage of “sustainable” biofuels to fossil fuels. That law sought to attain the European objectives for the promotion of the use of biofuels for transport (see Decision 2003/30/EC of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport, which had in the meantime been replaced by the directive of 23 April 2009, which also laid down requirements on sustainability).

Section 2.8 of the Law defined biofuels as fuels produced in the European Community (EC) which met a number of sustainability criteria. Thus, biofuels must be the product of agriculture and must not be from an agricultural zone outside the EC which had recently undergone deforestation. They must bring about a substantial reduction in CO<sub>2</sub> emissions and satisfy the technical specifications laid down by the EU with a view to the observance of social and environmental rules.

The applicant stated that he objected on religious grounds to the production and use of agrofuels. He took issue with the fact that the Law prevented him, when he used his car, from buying fuel not mixed with agrofuels, which made him the victim of discrimination by comparison with the “non-thinking members of the consumer society”. He claimed that there had been a violation of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), in conjunction with freedom of conscience and freedom to manifest his religion or belief (Article 9 ECHR).

The Court accepted that, on that basis, he had an interest in bringing an action for annulment.

As to the substance, the Court responded that on the assumption that the contested decision did constitute an interference with freedom of conscience and religion, the measure would nonetheless be reasonably justified.

As the contested provision sought to promote the use of renewable fuels, it pursued, in the Court’s view, a legitimate aim, namely to protect the rights and freedoms of others, within the meaning of Article 9.2 ECHR, in particular by helping to protect the environment.

The Court considered that the contested provision did not have disproportionate effects. The obligation to make available for consumption concerned exclusively the “sustainable biofuels” defined in Section 2.8 of the Law ... These sustainability criteria were of such a kind as to exclude from the application of the contested provision agrofuels which were the most problematic from the point of view of food safety, environmental protection, biodiversity and observance of the social rules ...

The Court further observed, in that regard, that the obligation to make sustainable agrofuels available for consumption was limited to 4 v/v % of the quantity of petrol products or diesel products placed on the market. The applicant could use a vehicle not propelled by petrol or diesel products.

The Court therefore dismissed the action.

#### *Supplementary information:*

In this case, the Court left open the question whether the objection to the use of biofuels for the propulsion of vehicles might be dictated by religious or philosophical considerations and whether the mandatory use of diesel/petrol mixtures could really be regarded as an interference with freedom of conscience and religion.

#### *Languages:*

French, Dutch, German.



#### *Identification:* BEL-2010-2-010

**a)** Belgium / **b)** Constitutional Court / **c)** / **d)** 29.07.2010 / **e)** 91/2010 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

#### *Keywords of the systematic thesaurus:*

1.4.9.2 Constitutional Justice – Procedure – Parties – **Interest.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

4.8.8.2.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – Implementation – **Distribution *ratione materiae.***

5.3.14 Fundamental Rights – Civil and political rights – ***Ne bis in idem.***

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life.**

5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

#### *Keywords of the alphabetical index:*

Federal State, implied powers / Home, concept / Home, inviolability / Home, unoccupied residential property / Right to acceptable housing / Taxation, tax on unoccupied residential properties / Administrative penalty.

#### *Headnotes:*

Although the judicial organisation within the Belgian Federal State is a competence reserved for the federal legislature, the Brussels-Capital Region, which is competent in housing matters, may authorise certain public authorities and associations to apply to a court for an order that the owners of unoccupied

properties ensure that the property is inhabited within a reasonable time (implied powers). Nor are those regulations contrary to either the right to the peaceable enjoyment of possessions or the right to respect for the home (Article 22 of the Constitution, Article 8 ECHR and Article 1 Protocol 1 ECHR).

The introduction, by decree of the Brussels-Capital Region, of an administrative fine where a residential property is unoccupied, even in the municipalities of that Region in which non-occupancy is already taxed under existing municipal fiscal regulations, is not contrary to the principle *non bis in idem* or to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

The officials of the Brussels-Capital Region competent to check whether a property is unoccupied may in exceptional cases actually enter a dwelling, the inviolability of which is guaranteed by the Constitution (Article 15 of the Constitution) and by the European Convention of Human Rights (Article 8 ECHR and Article 1 Protocol 1 ECHR). This interference is not contrary to those reference norms, in view of all the circumstances stated and in the light of the objective of countering what is mainly speculative non-occupation and of guaranteeing the constitutional right to acceptable housing.

### Summary:

The Regions (the Flemish and Walloon Regions and the Brussels-Capital Region), which in federalised Belgium are competent in housing policy matters, can take measures to prevent residential property being unoccupied (often for speculative reasons). Article 23 of the Constitution provides, moreover, that the competent legislatures are to ensure that everyone has the right to acceptable housing.

On 30 April 2009 the Brussels-Capital Region adopted a decree under which an administrative fine could be imposed where residential property was unoccupied. An administrative department was given responsibility for checking and investigating unoccupied buildings. The officials of that department could, either on their own initiative or in response to a complaint, visit, between 8 a.m. and 8 p.m., the homes of the owners of the property or those having a legal right in the property, after the latter had been notified by registered post at least one week before the date of the visit to the property. The competent officials could prepare a report, which constituted authentic evidence until proved otherwise, of the offence and submit it to the official in charge of the department, who could impose an administrative fine of €500 for each metre of frontage times the number of floors in the property.

A not-for-profit association, the “Syndicat national des propriétaires et copropriétaires” (“National association of owners and co-owners”), which protects the common interests of owners, brought an action before the Constitutional Court for annulment of the decree of the Brussels-Capital Region, which, according to the association, constituted an excessive restriction of the right to property. The association took issue mainly with the provision which empowers the President of the Court of First Instance, upon application by the administrative authorities or by associations established to protect the right to housing ..., to require the owner ... to take any appropriate measure to ensure that the building would be occupied within a reasonable time. The Court accepted that the association had an interest in bringing the action.

By its first plea, the applicant claimed that the Brussels-Capital Region was not competent because the judicial organisation of a matter fell to be determined by the federal authority.

In response, the Court observed that pursuant to Sections 10 and 19 of the Special Law of 8 August 1980 on institutional reforms, the regions are able to adopt regulations even in matters which the Constitution reserves for the federal legislature, provided that those regulations may be considered necessary for the exercise of the powers of the Region, that this matter lent itself to a differentiated regime and that the impact of the provisions at issue was only marginal. The Court accepted that this was the case here, especially as similar possibilities for claims also existed in relation to other matters.

In the first part of the second plea, the applicant took issue with the fact that the Brussels-Capital Region imposed a fine for unoccupied properties, when fiscal regulations concerning unoccupied properties already existed in a number of municipalities in that Region. This double levy was, in the applicant’s submission, contrary to the principle *non bis in idem* and to the right to property.

The Court referred to the case-law of the European Court of Human Rights (*Zolotoukhine v. Russia*, 10 February 2009) and observed that the principle *non bis in idem* can apply to a tax only where that tax is a measure of a penal nature. Without there being any need to examine whether the administrative fine introduced by the contested provision was penal in nature, the Court held that the municipal tax regulations were not in any way penal but were purely fiscal in nature. The principle *non bis in idem* therefore could not apply in this case.

The Court acknowledged that the contested decree entailed an interference with the right to property



safeguarded by Article 1 Protocol 1 ECHR, in that a fine could be imposed where a property intended wholly or in part for residential use was unoccupied. Any interference with the right to property must strike a fair balance between the requirements of the general interest and those of the protection of the right of every person to the peaceful enjoyment of his possessions. There must be a reasonable relationship of proportionality between the means employed and the aim pursued.

Finding a remedy for the shortage of housing was a legitimate aim. The measure in question was aimed at every property that was unoccupied for speculative reasons. The findings of the competent officers merely gave rise to a rebuttable presumption that the property in question was unoccupied. The fine could not be imposed if the residential property was unoccupied for reasons independent of the intention of the person concerned. The Court considered that the fine was not unreasonably high. It observed that those concerned must be given advance notice, have the right to defend their interests and be able to appeal to a court against the decision imposing the fine. The Court concluded that the interference with the right of property was proportionate and reasonably justified.

As regards the possible discrimination between the legal owners of an unoccupied property who would have to pay a municipal tax and a regional fine and the legal owners of an unoccupied property who would only have to pay the regional fine, the Court replied that this difference in treatment was the consequence not of the contested decree but rather of the application to two norms of different types, adopted by different authorities. Such a situation was not in itself contrary to the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution).

In the second part of the second plea, the applicant claimed that the possibility that the competent officers would enter the premises was contrary to the right to the inviolability of the home safeguarded by Article 15 of the Constitution in conjunction with Articles 6 and 8 ECHR and Article 1 Protocol 1 ECHR.

The Court defined "home" on the basis of the case-law of the European Court of Human Rights (*Prokopovitch*, 18 November 2004, and *Chelu*, 12 January 2010). An unoccupied property is not in principle a home, since no private or family life is developed there and because no one establishes sufficient and continuous links with it. Nonetheless, it could not be precluded that in certain isolated cases a residential property visited by the competent officers for the purpose of establishing that it was unoccupied could meet that definition of "home". It was therefore necessary to

consider whether that interference was reasonably justified.

The Court observed that the competent officers could only visit residential properties which were presumed to be unoccupied, either because they had been unfurnished for at least twelve consecutive months or because electricity and water consumption during that period was abnormally low. Furthermore, the home in which the legal owner lives could never be inspected by the officers, since the question of its being unoccupied does not arise in that case. In addition, the officers proposing to visit a residential property must notify the legal owner of that property one week before the date of the visit. That notice must state the basis on which the officers presume that it is unoccupied, so that the owners are still able to assert before the visit takes place that the property is not unoccupied. The Court observed, lastly, that the contested provision did not permit the use of force or compulsion if the owner or legal owner objected. Nor did the provision attach any negative consequence to a refusal to allow the officers to enter the property.

The Court concluded that the officers responsible for checking whether premises were unoccupied would enter a property the inviolability of which was guaranteed only in exceptional cases. Interference with the right to inviolability of the home could, in particular circumstances, be reasonably justified in the light of the objective of reducing the number of unoccupied properties and guaranteeing the constitutional right to housing.

The Court considered, lastly, that the right to the peaceable enjoyment of possessions was not affected disproportionately by the possibility that the President of the Court of First Instance could order that the premises be inhabited. The President could not, however, substitute himself for the owners or legal owners in the administration of their assets.

The Court therefore dismissed the action for annulment.

#### *Languages:*

French, Dutch, German.



## Bosnia and Herzegovina Constitutional Court

---

### Important decisions

*Identification:* BIH-2010-2-001

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 28.05.2010 / **e)** AP 2130/09 / **f)** / **g)** / **h)** CODICES (Bosnian, English).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

5.3.13.13 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Trial/decision within reasonable time.**

*Keywords of the alphabetical index:*

Criminal charge / Investigation, criminal, preliminary, time-limit, reasonable.

*Headnotes:*

The investigation, which has been pending for 4 years, failed to meet the requirement of “within a reasonable time” under Article II.3.e of the Constitution and Article 6.1 ECHR.

*Summary:*

I. The appellant lodged an appeal with the Constitutional Court complaining of a failure to adopt a decision within a reasonable time in investigation proceedings conducted by the Prosecutor’s Office of Bosnia and Herzegovina. In the present case, an investigation was initiated against the appellant on the basis of a reasonable suspicion that he had committed a criminal offence. On an order of the Prosecutor’s Office of 28 December 2005, he was deprived of his liberty – he was detained in custody on the basis of a court order on 29 December 2005, which was extended twice. He was eventually released on bail – the posting of bail being a guarantee of his presence until the completion of

criminal proceedings with a legally binding decision. This appellant is still in that situation.

The appellant considers that the investigation into his case has taken an unreasonable amount of time, as a result of which his right to a fair trial under Article II.3.e of the Constitution and Article 6.1 ECHR has been violated.

II. The Constitutional Court notes that the proceedings in question relate to the criminal proceedings initiated against the appellant on the basis of a reasonable suspicion of his having committed a war crime against the civilian population. In this regard, a question is raised as to the applicability of Article 6 ECHR to the present case.

The European Court of Human Rights considers that a “charge”, for the purposes of Article 6.1 ECHR, exists from the moment the state takes measures implying that a person has committed a criminal offence which “may substantially affect the situation of the suspect” (see, European Court of Human Rights, *Foti and Others v. Italy*, Judgment of 10 December 1982, *Series A*, no. 56). Accordingly, from that moment a person against whom a charge has been filed must be provided with all guarantees relating to the right to a fair trial. In the present case, an investigation was initiated against the appellant on the basis of a reasonable suspicion that he had committed a criminal offence, the appellant was detained in custody by a court order, which was extended twice, and finally, detention in custody was replaced by bail. It follows from this that the measures taken against the appellant imply that he has committed a criminal offence, and this implication has a significant effect on his situation. The above-mentioned measures were taken against the appellant during investigation proceedings, which, at the time the appeal was filed, had been pending for 4 years. They have still not been completed. In view of the aforesaid, the Constitutional Court concludes that a “charge”, for the purposes of Article 6.1 ECHR, exists in the appellant’s case and that he must be provided with the guarantees of the right to a fair trial, including the right to have a decision adopted within a reasonable time in the criminal proceedings.

It follows from the submissions to the Constitutional Court that the first measure implying that the appellant committed the criminal offence in question was taken on 28 December 2005 when the appellant was deprived of his liberty on the order of the Prosecutor’s Office. The relevant period in the present case is 4 years.

---

Taking into account that the investigation proceedings have been pending for 4 years, that the Prosecutor's Office has not put forward any reasons or reasoning which could be considered acceptable or justify such lengthy proceedings, and that it cannot be determined from the statements of the Prosecutor's Office or any other submission which measures and actions have been taken by the Prosecutor's Office to complete the present proceedings, the Constitutional Court finds that the investigation proceedings in the instant case, notwithstanding the fact that it is a complex case and having in mind the significance it holds for the appellant, have interfered with the balance between the requirements of efficient and rapid proceedings and the proper administration of justice. In addition, it finds that the investigation, which has been pending for 4 years, has failed to meet the requirement of "within a reasonable time" under Article II.3.e of the Constitution and Article 6.1 ECHR.

#### *Languages:*

Bosnian, Serbian, Croatian, English (translations by the Court).



#### *Identification:* BIH-2010-2-002

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary / **d)** 28.05.2010 / **e)** U 12/09 / **f)** / **g)** / **h)** CODICES (Bosnian, English).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.1.4.8 Sources – Categories – Written rules – International instruments – **International Covenant on Civil and Political Rights of 1966.**

2.1.1.4.9 Sources – Categories – Written rules – International instruments – **International Covenant on Economic, Social and Cultural Rights of 1966.**

2.1.1.4.12 Sources – Categories – Written rules – International instruments – **Convention on the Elimination of all Forms of Discrimination against Women of 1979.**

3.16 General Principles – **Proportionality.**

5.2 Fundamental Rights – **Equality.**

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

#### *Keywords of the alphabetical index:*

Discrimination / Leave, maternity, remuneration / Remuneration, equal.

#### *Headnotes:*

A legal provision regarding the payment of the remuneration for maternity leave that provides for a difference in treatment of employees who work in the same institutions but live in different Entities is discriminating.

#### *Summary:*

I. The applicants filed a request with the Constitutional Court for a review of the constitutionality of Article 35 of the Law on Salaries and Remunerations in the Institutions of Bosnia and Herzegovina. The applicants consider that the impugned provision is inconsistent with Article II.4 of the Constitution and Article 1.1 and 1.2 Protocol 12 ECHR. They also consider that the above-mentioned provision violates the following international instruments: the International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto, the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights, and the European Social Charter. In addition, they consider that the impugned provision is inconsistent with the Law on Prohibition of Discrimination. The applicants allege that following the entry into force of the Law, the Ministry of Finance and Treasury issued an Instruction terminating the payment of salary reimbursement (payments in replacement of salary) from the Budget to women employees on maternity leave residing in the Federation of Bosnia and Herzegovina, which until then had been paid on a regular basis. At the same time, salary reimbursement is paid in full from the Budget funds to women employees residing in the *Republika Srpska*, but at the expense of the Public Fund of that Entity. In the applicants' opinion, the application of the impugned provision gives rise to discrimination and segregation of women employees within the same institution as employees from the same institution at the same level of authority are prevented from equal enjoyment of the right originating from employment relations.

II. For a difference in treatment to be objectively and reasonably justified two conditions must be fulfilled – the principle of differential treatment (a difference in treatment) may be applied for the purpose of achieving a legitimate aim and where there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

Firstly, the Constitutional Court must consider the issue of whether there has been a differential treatment. *Prima facie*, this does not seem to have occurred in the present case since Article 35, regulating maternity leave, refers to all women working in State institutions. However, it should be noted that this provision refers to the place of payment of maternity leave benefits. The impugned provision refers to the Entities' legislation on social policy. Whereas in the *Republika Srpska* women are guaranteed the receipt of their whole salary, in the Federation of Bosnia and Herzegovina, this issue is dealt with by the Federation authorities as well as the cantons or even the municipalities and results in important differences, with there being no payment of benefits whatsoever in some cantons. Thus it is clear that Article 35 treats differently a group of persons – the women working in State institutions – who, as women employees of a State institution, are in the same legal situation. Therefore, this differential treatment needs to be justified.

Secondly, the Constitutional Court must consider the issue concerning the legitimate aim pursued by Article 35. The Constitutional Court must examine whether this differential treatment could be justified by the division of responsibilities between the State and the Entities. The issue of social policy falls under the competence of the Entities and not under the competence of the State of Bosnia and Herzegovina. In this respect, the Constitutional Court holds that the exclusive competence of the Entities does not take into account the fact that maternity leave is not only a matter of social policy but also part of human rights and their protection. Taking into account the aforementioned, the Constitutional Court recalls that maternity leave especially concerns the right of women not to be discriminated against and to enjoy decent conditions of work, the right to health, the right to private and family life – as well as the children's rights. The Constitutional Court recalls that maternity benefits were previously linked to health care and social insurance. The Insurance Agency has competence to harmonise this part of the legislative activities of the Entities to meet the requirements for integration into the European Union. The obligation to comply with the requirements for integration into the European Union exists also covers maternity benefits. The Constitutional Court holds that the competence of the Entities to regulate social policy is not

appropriate to the aim sought to be achieved with regard to social protection and equal remuneration. The State and the Entities have the joint obligation not only to ensure the highest level of protection of human rights but also to guarantee an equal implementation of these rights. In view of the above, the Constitutional Court considers that the impugned provision does not pursue a legitimate aim.

Thirdly, the Constitutional Court has to consider the issue of proportionality. With respect to this principle, the Constitutional Court observes that the same aim (i.e., providing social protection and equal remuneration for maternity leave) could be achieved through other means and not only by strict reliance on local regulations. The Law on Prohibition of Discrimination obliges all competent authorities in the State and the Entities to harmonise all regulations in order to establish non discriminatory conditions of political, economic and social life in Bosnia and Herzegovina. The Constitutional Court does not see any reason why the State institutions are not able, according to their own financial possibilities, to directly pay this benefit to employees in order to avoid any discriminatory treatment, since the State is obliged to finance, *inter alia*, payments to employees of the institutions of Bosnia and Herzegovina, and since this particular payment has no impact on any other ancillary benefits provided to employees by the Entities. Furthermore, the Constitutional Court points out that, even though Bosnia and Herzegovina has a complex structure (U-5/98, paragraph 13), and without classifying its constitutional-legal order, in the Federal states at the European level there is no maternity benefit scheme that is similar to the one at issue here. In all of the Federal states (e.g., Austria, Germany, Switzerland and Russia), maternity leave is equal for all employees, regardless of their place of residence. The only exception is Switzerland, where employees residing in the Canton of Geneva receive two additional weeks of maternity leave compared to those residing in other Cantons; however, the Federal government has set minimum standards that all Cantons must meet, ensuring that there are no great disparities between employees with regards to maternity benefits. This example typifies the notion that additional rights may be made available at the local level so long as minimum standards are guaranteed by the Federal government. On the one hand, the Constitutional Court respects the particularities of the constitutional order of Bosnia and Herzegovina. On the other hand, the common constitutional standards of complex states – especially at the European level – must be taken into account, and departures from them should only occur where there is sufficient justification. In the present case, the Constitutional Court finds no reason to depart from common European standards.

Consequently, the Constitutional Court holds that the impugned provision is not proportionate to the aim sought by the Law on Salaries and Remuneration in the Institutions of Bosnia and Herzegovina. Considering the difference in remuneration in the *Republika Srpska* and in the Federation, especially in the cantons where no benefit is granted for maternity leave, the impugned provision constitutes a discrimination which is in itself disproportionate, the disproportionate nature being increased even more by the differences in the regulations in the Federation of Bosnia and Herzegovina. Given the aforementioned, the Constitutional Court concludes that the impugned provision is discriminatory and in contravention of Article II.4 of the Constitution in conjunction with Article 1 Protocol 12 ECHR, Articles 1, 2 and 11 of the UN Convention on the Elimination of All Forms of Discrimination Against Women as well as Article 26 of the International Covenant on Civil and Political Rights and Article 10 of the International Covenant on Economic, Social and Cultural Rights.

#### *Languages:*

Bosnian, Serbian, Croatian, English (translations by the Court).



## Brazil

### Federal Supreme Court

#### Important decisions

*Identification:* BRA-2010-2-009

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 28.08.1996 / **e)** 633 / **f)** Extradition / **g)** *Diário da Justiça* (Justice Gazette), 06.04.2001 / **h)**.

*Keywords of the systematic thesaurus:*

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.  
5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.

*Keywords of the alphabetical index:*

Extradition, criminal conduct, respect for human rights.

*Headnotes:*

During the judgment of extradition, the Court determined that objective incriminating norms play a guarantor function in democratic regimes. The State establishment cannot construe the definition of criminal conduct through the use of vague and imprecise expressions or else the whole system of public liberties would be threatened.

The need for international cooperation does not exempt Brazil from ensuring compliance and respect for the fundamental rights of the foreigner whose extradition is being sought.

Furthermore, the Federal Supreme Court is not in a position to ignore any transgression to fundamental rights. Even more so if one considers that the Brazilian Constitution establishes under its Article 4, II, the need for prevalence of human rights as a duty of the Republic.

*Summary:*

I. The extradition of a Chinese citizen because of his criminal conduct was not precisely typified under the law.

II. The Supreme Court considered that in order for extradition to be authorised, the crime for which the extraditee is pursued or was sentenced must be typified under the law of demanding State which must also clearly and precisely describe punishable criminal conduct.

The mere possibility for the extraditee to be stripped of any of his due process rights as guaranteed under the Brazilian Constitution is enough to invalidate the extradition proceeding.

III. The Plenary of the Supreme Court ruled to deny extradition.

#### *Supplementary information:*

- Article 4.II, 5.XLVII.a of the Constitution.

#### *Languages:*

Portuguese, English (translation by the Court).



#### *Identification:* BRA-2010-2-010

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 29.03.2000 / **e)** 79785 / **f)** Appeal in *Habeas Corpus* / **g)** *Diário da Justiça* (Justice Gazette), 22.11.2002 / **h)**.

#### *Keywords of the systematic thesaurus:*

1.3.5.1 Constitutional Justice – Jurisdiction – The subject of review – **International treaties.**

2.2.1 Sources – Hierarchy – **Hierarchy as between national and non-national sources.**

5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Double degree of jurisdiction.**

#### *Keywords of the alphabetical index:*

Human rights treaties, states / Right to appeal, constitutional states.

#### *Headnotes:*

Within the Brazilian constitutional order, treaties do not supersede the Constitution.

#### *Summary:*

I. However, Constitutional Amendment no. 45/2004 gave constitutional status to human rights treaties signed by the Federative Republic of Brazil. The appellant invoke one of those treaties which guarantees the right of appeal to a higher jurisdiction.

II. Within that framework, the Supreme Court of Brazil analysed the right of appeal. The Court then debated the fact that if the case had already been appealed to and judged by a collegiate body of judges not belonging to a higher Court, that did not by itself impose the need to appeal to a higher Court, legislatures being free to regulate those cases where appeals may be judged on the same level of jurisdiction though necessarily by a collegiate body.

Thus, even though the Constitution and the treaties signed by Brazil guarantee the right of appeal and the actual appeals system is very complex, the Court did not envisage a constitutional right of appeal to a higher level of jurisdiction as long as the first decision is reviewed by a collegiate body even if at the same level of jurisdiction.

III. The ruling was not unanimous. In asserting a constitutional right of appeal to a higher level of jurisdiction, a dissenting opinion of one of the Supreme Court's judges was expressed to recognise three branches of constitutional rights and guarantees as follows:

- a. rights and guarantees as inscribed in Article 5 of the Brazilian Constitution which lists fundamental rights;
- b. rights and guarantees tied to those principles adopted by the Constitution (Article 5.2); and
- c. rights and guarantees to be found in the international treaties signed by the Federative Republic of Brazil (Article 5.2).

The following are some examples of legal situations in which an appeal may be judged on the same level of jurisdiction:

- *Embargos de Declaração*, which is an Appeal requesting clarification of the decision, that could also be named 'motion for clarification';
- Appeals to the Appellate Body of Special Civil Courts (*Juizados Especiais Cíveis*) made up of three judges on the same level of jurisdiction;
- Appeals in original jurisdiction cases before the Supreme Court.

The Plenum of the Court overruled the appeal thus declaring that the right of appeal as expressed in the Brazilian Constitution shall be interpreted as a mere need of re-examination of the case by a collegiate body of judges, not necessarily on a higher level of jurisdiction.

*Supplementary information:*

- Articles 102.II.a, 102.III.b, 105.II.a, 105.II.b, 121.4.III, 121.4.IV and 121.4.V of the Constitution.

*Languages:*

Portuguese, English (translation by the Court).



*Identification:* BRA-2010-2-011

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 11.10.2000 / **e)** 116121 / **f)** Extraordinary Appeal / **g)** *Diário da Justiça* (Justice Gazette), 25.05.2001 / **h)**

*Keywords of the systematic thesaurus:*

- 4.10.7 Institutions – Public finances – **Taxation**.
- 5.3.39 Fundamental Rights – Civil and political rights – **Right to property**.
- 5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

*Keywords of the alphabetical index:*

Government, taxation, lease / Personal property, taxes.

*Headnotes:*

“The municipal services tax levy on personal property lease is unconstitutional”.

*Summary:*

I. This case refers to an extraordinary appeal filed against decision that considered possible the levy of municipal services taxes (ISS in the Portuguese acronym) on crane lease. The appellant argued that the ISS, pursuant to the Constitution, should not be levied on personal property lease as it did not consist of

provision of service. Thus, Decree-Law no. 406/1968 and Law no. 3.750/1971 of Municipality of Santos, State of São Paulo, should be considered unconstitutional for setting forth such levy.

II. The Supreme Court of Brazil, by majority, granted the extraordinary appeal as they considered that the ISS must only be levied on legal transaction that entails obligations to do. The personal property lease gives only rise to an obligation to deliver between the lessor and the lessee as it consists of an obligation to maintain the property available to the lessee. Thus, as it does not feature an actual activity, it can not be treated as if it were a service for the purposes of the tax levy. Therefore, the majority ruled that this type of taxation, besides being unconstitutional, violates Articles 100 of the Brazilian Tax Code, whereby no tax statute can modify the content of private law categories.

III. The dissenting opinions stated that the personal property lease does not entail only an obligation to give the property to the lessor, but also the obligation for the lessee to maintain it in good condition. That clearly features an obligation to do and, accordingly, the ISS should levy on this type of lease.

The reasoning in this case, combined with other precedents, led the Supreme Court to issue the Binding Precedent no. 31, which reads as follows: “The municipal services tax levy on personal property lease is unconstitutional”.

*Supplementary information:*

- Biding Precedent no. 31;
- Article 100 of the Tax National Code;
- Law no. 3.750/1971 of the Municipality of Santos of São Paulo State;
- Decree Law no. 406/168 of the Municipality of Santos of São Paulo State.

*Languages:*

Portuguese.



*Identification:* BRA-2010-2-012

**a)** Brazil / **b)** Federal Supreme Court / **c)** Plenary / **d)** 07.12.2000 / **e)** 783 / **f)** Extradition / **g)** *Diário da Justiça* (Justice Gazette), 05.10.2001 / **h)**.

*Keywords of the systematic thesaurus:*

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners**.

*Keywords of the alphabetical index:*

Extradition, legality of the request.

*Headnotes:*

It is not within the competence of the Brazilian Supreme Federal Tribunal to analyse the case on the merits, in a case of extradition in as much as an order issued by an independent and competent judicial authority had been edited on the basis of a reasoned justification and under respect of due process of law, the crime is sanctioned in both the Brazilian and the other State's legislation and that the sanction is still applicable.

*Summary:*

I. An extradition was requested by the United States of Mexico for a Mexican citizen on the basis of his indictment by a judge on charges of sexual abuse of minors.

II. Three considerations were taken by the Supreme Court of Brazil: First, as to the fact that to engage in a sexual conduct with a minor also consubstantiates a crime within the legal framework of Brazil's constitutional order (that which is defined as 'corruption of minor'). Then, the recognition that prison was ordered by an independent judicial authority under reasoned justification. Finally, the verification that the Statute of limitations had not yet run out.

The Plenum of the Supreme Court ruled:

- a. that it is not within the competence of the Brazilian Supreme Federal Tribunal to analyse the case on the merits, inasmuch as an order issued by an independent and competent judicial authority had been edited on the basis of a reasoned justification and under respect of due process of law;

- b. that the sanctioned conduct was proven to be a crime according to legal regulation on the matter in the United States of Mexico;
- c. that such conduct was also considered a crime according to Brazilian law;
- d. that the extraditee can still be held accountable and face sanctions.

Therefore, the extradition was authorised.

*Supplementary information:*

- Article 16 of the Constitution of Mexican States;
- Articles 109.4, 213, 218, 219, 224.A of the Criminal Code of Brazil.

*Languages:*

Portuguese, English (translation by the Court).





# Canada

## Supreme Court

### Important decisions

*Identification:* CAN-2010-2-002

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 07.05.2010 / **e)** 32601 / **f)** R. v. National Post / **g)** *Canada Supreme Court Reports* (Official Digest), [2010] 1 S.C.R. 477 / **h)** [www.droit.umontreal.ca/doc/csc-scc/en/index/html](http://www.droit.umontreal.ca/doc/csc-scc/en/index/html); 318 *Dominion Law Reports* (4th) 1; 401 *National Reporter* 104; 254 *Canadian Criminal Cases* (3d) 469; 74 *Criminal Reports* (6th) 1; [2010] S.C.J. no. 16 (*Quicklaw*); CODICES (English, French).

*Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**  
 5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**  
 5.3.22 Fundamental Rights – Civil and political rights – **Freedom of the written press.**

*Keywords of the alphabetical index:*

Media, newspaper / Search warrant, validity / Journalist, sources, disclosure.

*Headnotes:*

Freedom to publish the news necessarily involves a freedom to gather the news, but each of the many important news gathering techniques should not itself be regarded as entrenched in the Constitution. The law needs to provide solid protection against the compelled disclosure of secret sources in appropriate situations, but the history of journalism in this country shows that the purpose of freedom of expression afforded by Section 2.b of the Canadian Charter of Rights and Freedoms can be fulfilled without the necessity of implying a constitutional immunity. Accordingly, a judicial order to compel disclosure of a secret source in accordance with the principles of common law privilege would not in general violate Section 2.b. The media's Sections 2.b and 8 Charter (the right to be secure against unreasonable search and seizure) interests are clearly implicated when the police seek to seize documents in their possession.

Therefore, warrants and assistance orders against the media must take into account their special position and be reasonable in the totality of circumstances.

*Summary:*

I. The National Post employed M as a journalist. M investigated whether C, then Prime Minister of Canada, was improperly involved with a loan from a federally funded bank to a hotel in C's riding which allegedly owed a debt to C's family investment company. X, a secret source, provided M with a document that appeared to be the bank's authorisation of its loan to the hotel in exchange for an unconditional promise of confidentiality. X later feared that DNA analysis might reveal his or her identity and asked M to destroy the document and its envelope, but M refused. M faxed copies of the document to the bank, to the Prime Minister's office, and to a lawyer for the Prime Minister. All three said that the document was a forgery. The bank complained to the Royal Canadian Mounted Police and an officer asked the appellants to produce the document and the envelope as evidence of the alleged forgery. They refused and M declined to identify his source. The officer applied for a search warrant and an order compelling M's editor to assist the police in locating the document and the envelope. He intended to submit them for forensic testing. The hearing proceeded *ex parte* and a search warrant and an assistance order were issued. The reviewing judge set them aside, but the Court of Appeal reinstated them. In a majority decision, the Supreme Court of Canada upheld the Court of Appeal's decision.

II. The majority of the Court held that, although the common law does not recognise a class privilege protecting journalists from compelled disclosure of secret sources, a promise of confidentiality will be respected if: the communication originates in a confidence that the identity of the informant will not be disclosed; the confidence is essential to the relationship in which the communication arises; the relationship is one which should be sedulously fostered in the public good; and the public interest in protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth. The media party asking the court to uphold a promise of confidentiality must prove all four criteria. This includes, under the fourth criterion, weighing up the nature and seriousness of the offence under investigation and the probative value of the evidence sought to be obtained measured against the public interest in respecting the journalist's promise of confidentiality. The purpose of the investigation is relevant as well. Until the media have met all four criteria, no privilege arises and the evidence is presumptively compellable and admissible. Therefore,

no journalist can give a secret source an absolute assurance of confidentiality.

In this case, the first three criteria are met. The communication originated in confidence and neither the journalist source relationship nor the communication would have occurred without confidentiality. This type of journalist source relationship ought to be fostered given the importance of investigative journalism exploring potential conflicts of interest at the highest levels of government. The appellants, however, have failed to establish the fourth criterion. The alleged offences are of sufficient seriousness to justify the decision of the police to investigate the criminal allegations. The physical evidence is essential to the police investigation and likely essential as well to any future prosecution. While it is appropriate under this criterion to assess the likely probative value of the evidence sought, the reviewing judge ought not to have pre-empted the forensic investigation by seemingly prejudging the outcome without first considering all the relevant factors in her assessment.

The majority also found that the search warrant was reasonable within the meaning of Section 8 of the Charter. The conditions governing the search ensured that the media organisation would not be unduly impeded by a physical search in the publishing or dissemination of the news. The order contained the usual clause directing that any documents seized be sealed on request. The police had reasonable grounds to believe that criminal offences had been committed and that relevant information would be obtained.

Where, as here, a court proceeds *ex parte*, adequate terms must be inserted in the warrant to protect the special position of the media, and to permit the media ample time and opportunity to challenge the warrant. In this case, the appellants' position was fully protected by the terms of the warrant. They have not demonstrated any prejudice on that account. The assistance order also was reasonable. Given the concerted action between M and his editor, it was appropriate to enlist the editor's assistance in locating and producing the concealed documents. Accordingly, the warrant and assistance order were properly issued and must be complied with even if the result is to disclose the identity of the secret source.

III. In a concurring opinion, one judge disagreed about the lack of notice. However, since the lack of notice did not make the search unreasonable and the issuing judge proceeded on the basis of established law, the search warrant should not be quashed.

In a separate opinion, a dissenting judge concluded that a search warrant of media premises is a particularly serious intrusion, and a decision should not be made about its propriety without submissions from it unless there are urgent circumstances justifying an *ex parte* hearing. No such notice was given to the National Post and there was no such urgency. It therefore lost the opportunity to make timely submissions. Had they been made, the outcome of the hearing might have been different.

#### *Languages:*

English, French (translation by the Court).



#### *Identification: CAN-2010-2-003*

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 23.07.2010 / **e)** 33089 / **f)** Vancouver (City) v. Ward / **g)** *Canada Supreme Court Reports* (Official Digest), [2010] 2 S.C.R. 28 / **h)** <http://scc.lexum.umontreal.ca/en/2010/2010scc27/2010scc27.html>; [2010] S.C.J. no. 27 (*Quicklaw*); CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity.**  
 5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**  
 5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy.**  
 5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

#### *Keywords of the alphabetical index:*

Search, strip search, incident to arrest / Damages, quantum / Property, seizure / Remedy, adequate, determined by the court.

*Headnotes:*

The Canadian Charter of Rights and Freedoms guarantees the fundamental rights and freedoms of all Canadians and provides remedies for their breach, namely Section 24.1 under which the court is authorised to grant such remedies to individuals for infringement of Charter rights as it “considers appropriate and just in the circumstances”. The language of Section 24.1 is broad enough to include the remedy of constitutional damages for breach of a claimant’s Charter rights if such remedy is found to be appropriate and just in the circumstances of a particular case.

*Summary:*

I. During a ceremony in Vancouver, the city police department received information that an unknown individual intended to throw a pie at the Prime Minister who was in attendance. Based on his appearance, police officers mistakenly identified W as the would-be pie-thrower, chased him down and handcuffed him. W, who loudly protested his detention and created a disturbance, was arrested for breach of the peace and taken to the police lockup. Upon his arrival, the corrections officers conducted a strip search. While W was at the lockup, police officers impounded his car for the purpose of searching it once a search warrant had been obtained. The detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge W for attempted assault. W was released approximately 4.5 hours after his arrest. He brought an action in tort and for breach of his rights guaranteed by the Charter. With respect to the strip search and the car seizure, the trial judge held that, although the Province and the City did not act in bad faith and were not liable in tort for either incident, the Province’s strip search and the City’s vehicle seizure violated W’s right to be free from unreasonable search and seizure under Section 8 of the Charter. He assessed damages under Section 24.1 of the Charter at \$ 100 for the seizure of the car and \$ 5,000 for the strip search. The Court of Appeal, in a majority decision, upheld the trial judge’s ruling. In a unanimous decision, the Supreme Court of Canada allowed the appeal in part.

II. The Court concluded that the claimant who seeks damages under Section 24.1 of the Charter must first establish a breach of his Charter rights; at the second step in the inquiry, he must show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or

deterrence of future breaches. Once the claimant has established that damages are functionally justified, the state has the opportunity to demonstrate, at the third step, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. Countervailing considerations include the existence of alternative remedies and concern for effective governance.

If the state fails to negate that the award is “appropriate and just”, the final step is to assess the quantum of the damages. To be “appropriate and just”, an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of Section 24.1 damages. Where the objective of compensation is engaged, the concern is to restore the claimant to the position he or she would have been in had the breach not been committed. With the objectives of vindication and deterrence, the appropriate determination is an exercise in rationality and proportionality. Generally, the more egregious the breach and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be. In the end, Section 24.1 damages must be fair to both the claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests. Damages under Section 24.1 should also not duplicate damages awarded under private law causes of action, such as tort, where compensation of personal loss is at issue.

Here, damages were properly awarded for the strip search of W. This search violated his Section 8 Charter rights and compensation is required, in this case, to functionally fulfill the objects of constitutional damages. Strip searches are inherently humiliating and degrading and the Charter breach significantly impacted on W’s person and rights. The correction officers’ conduct which caused the breach was also serious. Minimum sensitivity to Charter concerns within the context of the particular situation would have shown the search to be unnecessary and violative. Combined with the police conduct, the impingement on W also engages the objects of vindication of the right and deterrence of future breaches. The state did not establish countervailing factors and damages should be awarded for the breach. Considering the seriousness of the injury and the finding that the corrections officers’ actions were not intentional, malicious, high-handed or oppressive, the trial judge’s \$5,000 damage award was appropriate.

With respect to the seizure of the car, the Court found that W did not establish that damages under Section 24.1 are appropriate and just from a functional perspective. The object of compensation is not engaged as W did not suffer any injury as a result of the seizure. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. A declaration under Section 24.1 that the vehicle seizure violated W's right to be free from unreasonable search and seizure under Section 8 of the Charter adequately serves the need for vindication of the right and deterrence of future improper car seizures.

*Languages:*

English, French (translation by the Court).



## Croatia Constitutional Court

### Important decisions

*Identification:* CRO-2010-2-007

a) Croatia / b) Constitutional Court / c) / d) 12.05.2010 / e) U-X-2270/2007 / f) / g) *Narodne novine* (Official Gazette), 66/10 / h) CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers.**  
3.9 General Principles – **Rule of law.**

*Keywords of the alphabetical index:*

Head of State / Legislator, omission / Parliament.

*Headnotes:*

In the process of amending the Constitution, and in the light of the unconstitutionality resulting from the protracted failure of lawful regulation of the organisation and competence of the Office of the President under the second sentence of Article 106.2 of the Constitution, the Constitutional Court indicated the requirement that each acting part of a governmental body must be regulated by a legal norm. This requirement stems from the principle of the rule of law as a highest value of the constitutional order. The Constitutional Court reminded Parliament of the need to resolve this issue without delay.

*Summary:*

I. The Constitutional Court was asked to examine the conformity with the Constitution of the Decision on Amending the Decision on the Office of the President of the Republic of 12 January 2004, together with two Decisions amending the Decision on the Office of the President of the Republic of 19 April 2005 and 2 March 2010. These had been passed during several presidential terms of office. In proposals filed by the Constitutional Court, the formal unconstitutionality of these decisions was highlighted. The point was made that under Article 106 of the Constitution, the organisation and activities of the Office of the

President cannot be regulated by a decision, and the President of the Republic is not competent to pass such a decision.

The President of the Republic passed the decisions noted above by invoking Article 106 of the Constitution.

The second sentence of Article 106.2 stipulates that the organisation and competence of the Office of the President shall be regulated by law and internal rules.

II. The Constitutional Court noted that Parliament had not enacted any legislation which would, in terms of the second sentence of Article 106.2, regulate the competence and organisation of the Office of the President, and that the President did not pass the internal rules in the second sentence of Article 106.2 aimed at elaborating the provision of the act on the competences and organisation of the Office of the President. The failure to regulate in a legal act the organisation and competence of the Office of the President on the grounds of the second sentence of Article 106.2 has lasted continuously for more than seven years, starting from the expiry of the two-year deadline for passing the act provided for in Article 3 of the Constitutional Act on the Implementation of the Constitution (*Narodne novine*, no. 28/01).

Within the framework of the organisation of the State laid down in the Constitution, and of the constitutional position of the President of the Republic, there is undoubtedly a need to establish the Office of the President of the Republic to carry out advisory and general activities arising from the competence of the President's work. This could include the performance of advisory, administrative, expert and other activities connected with the preparation and implementation of the decisions and acts the President passes, and the exercise of the President's other powers and obligations under the Constitution and laws.

Under the second sentence of Article 106.2, Parliament must pass an act regulating the organisation and competence of the Office of the President of the Republic. No such legislation has been enacted to date.

In the Constitutional Court's opinion, a specific examination of the meaning of the legislative body's failure to proceed in accordance with its constitutional obligation was not needed. Because of the special constitutional conditions that had arisen due to the period of time during which the legislation had not been enacted, it was sufficient to point out that each acting component of a governmental body must be regulated by a legal norm. This requirement stems from the principle of the rule of law as a highest value of the constitutional order, laid down in Article 3 of the Constitution.

Since proceedings are presently under way for amending the Constitution, the Constitutional Court deemed it appropriate, under the powers vested in Article 128 indent 5 of the Constitution and Article 104 of the Constitutional Act on the Constitutional Court, to ascertain the existence of the above problem and highlight the need to resolve it.

The Constitutional Court noted that it did not have the authority to assess whether it would be of more use to amend Article 106 of the Constitution or to act in accordance with it, since Parliament alone can make this assessment. Whether Parliament decides to amend Article 106 of the Constitution or to act in accordance with it, it has confined itself to indicating the need to an immediate resolution to the problem.

#### *Supplementary information:*

Article 17 of the Constitutional Amendment (*Narodne novine* no. 76/10) amends the second sentence of Article 106.2 of the Constitution so that the organisation and competence of the Office of the President are now regulated by a decision passed by the President of the Republic.

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2010-2-008

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 12.05.2010 / **e)** U-III-203/2007 and others / **f)** / **g)** *Narodne novine* (Official Gazette), 66/10 / **h)** CODICES (Croatian, English).

#### *Keywords of the systematic thesaurus:*

5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings.**

#### *Keywords of the alphabetical index:*

Housing, right / Property, socially owned, equal treatment / Tenancy, right / Time limit, element of right / Constitutional Court, decision, application / Constitutional Court, decision, binding force /

Constitutional Court, decision, execution /  
 Constitutional Court, interpretation, binding effect /  
 Constitutional protection, application.

#### *Headnotes:*

There are no legal grounds for interpreting the non-existence of a deadline for carrying out a particular activity (especially in situations where the deadline was repealed by decision of the Constitutional Court) to the detriment of the party which would have to carry it out. In this case the opposite interpretation of the competent ordinary court violated the constitutional right to a fair trial.

Failure to heed the legal views of the Constitutional Court and to respect the binding legal standards established in the constitutional case-law in relation to the protection of human rights is regarded as a breach of Articles 31 and 77 of the Constitutional Act on the Constitutional Court.

#### *Summary:*

I. The applicant, a natural person, lodged a constitutional complaint against the judgment of the Pula County Court of 11 December 2006, which upheld the appeal of the defendant (the Republic of Croatia for the Ministry of Defence) and altered the judgment of the Pula Municipal Court of 27 February 2001 in such a way as to reject the claim of the applicant (i.e. the plaintiff in civil proceedings conducted for the purchase of a state-owned flat). The applicant was of the opinion that the Pula County Court's judgment violated his constitutional rights guaranteed in Articles 14.2, 29.1 and 35 of the Constitution, because in the renewed appellate proceedings, the Pula County Court failed to comply with the legal opinion of the Constitutional Court expressed in its decisions U-I-697/1995 of 29 January 1997 and U-III-1243/2004 of 19 October 2006. He suggested that the Court should overturn the disputed judgments.

In an earlier decision (Decision no. U-III-1243/2004 of 19 October 2006) the Constitutional Court upheld the applicant's constitutional complaint in the same legal matter, overturned the judgment of the Pula County Court of 1 December 2003 and referred the case back to that court for new proceedings.

The issue under dispute in the court proceedings was whether the applicant had submitted a timely request to purchase the flat in which he was a specially protected tenant. Based on the fact that the provisions of Article 20.1 and 20.2 of the Act Amending the Specially Protected Tenancies (Sale to

Occupier) Act (*Narodne novine*, no. 58/95 –the "AASOA") were repealed by the Decision of the Constitutional Court no. U-I-697/1995 of 29 January 1997, the Pula Municipal Court had, in its Decision of 27 February 2001, granted the applicant's request to purchase the flat, finding that the applicant was not precluded from submitting his request to purchase it. The first instance judgment accordingly accepted the applicant's claim and the defendant was obliged to conclude with the applicant a sale contract under the conditions in the Specially Protected Tenancies (Sale to Occupier) Act, and to hand the flat over to the buyer (the applicant), free of persons and other encumbrances. The judgment was, in effect, a replacement for the contract of sale. The respondent was also ordered to compensate the applicant for his litigation costs. The first instance court also found in its judgment that neither of the parties had disputed the applicant's right as a specially protected tenant to purchase the flat, neither did they argue the fact that the respondent had received the applicant's request to purchase the flat on 22 October 1999 and had not concluded a sales contract for its purchase with the applicant until the point when the civil action was submitted.

With respect to the respondent's appeal, the Pula County Court handed down a judgment of 1 December 2003 overturning the judgment of the Pula Municipal Court dated 27 February 2001 and rejecting the applicant's claim to purchase the flat, on the basis that the applicant's request was made after the expiry of the statutory deadline.

The applicant then lodged a constitutional complaint against the judgment of the Pula County Court of 1 December 2003, whereupon the Constitutional Court handed down Decision no. U-III-1243/2004 of 19 October 2006. It held that the Pula County Court judgment had violated the applicant's constitutional right to the equality of all before the law, guaranteed in Article 14.2 of the Constitution. In its decision the Constitutional Court expressed the following legal opinion:

II. "The Constitutional Court finds that the second-instance court in its judgment placed the applicant, as a specially protected tenant in a 'state-owned' flat, at a disadvantage in comparison to other specially protected tenants in 'state-owned' flats. The applicant was denied the right to purchase the flat in which he lived due to a flaw in the legal opinion of the second-instance court, which misinterpreted a relevant regulation of substantive law. This led to a direct violation of the right to the equality of all before the law, guaranteed in Article 14.2 of the Constitution, and leads to the conclusion that the impugned judgment was arbitrarily rendered."

As a result of Constitutional Court Decision no. U-III-1243/2004 of 19 October 2006, the Pula County Court repeated the proceedings in which it passed the new judgment of 11 December 2006, which the applicant is disputing in these constitutional review proceedings. In its judgment, the Pula County Court again upheld the respondent's appeal, overturned the first-instance judgment of the Pula Municipal Court of 27 February 2001 and rejected the applicant's claim. It also noted in the judgment that the deadline for submitting a request to purchase a flat expired on 30 June 1999 (Ordinance of the Government, *Narodne novine* no. 163/98), and that the applicant had missed the deadline, as he submitted his request on 22 October 1999. The point was also made in the second-instance judgment that the fact that proceedings were pending between the parties to terminate the specially protected tenancy did not affect the applicant's obligation to submit a timely request to purchase the flat.

The Constitutional Court again referred to the legal standpoint it expressed in Decision no. U-I-697/1995 of 29 January 1997. In this Decision, it repealed the provisions of Article 20.1 and 20.2 of the AASOA because they breached the Constitution. According to this standpoint, the inequality in the position of purchasers of state-owned flats and of other flats, which is in breach of the Constitution, also exists with reference to the deadline for the submission of a request to purchase a state-owned flat. Articles 20.1, 20.2 and 21 of the Act were repealed, because they do not guarantee the equality of the individuals who must request the right to purchase a flat within 60 or 30 days from the date when the Act entered into force, and other flat purchasers who had one year to submit a request, which was subsequently extended several times.

In view of the legal standpoint mentioned above, and the finding of the Constitutional Court that no legal grounds exist to interpret the non-existence of a deadline for carrying out a particular activity (especially in situations where the deadline was repealed by decision of the Constitutional Court) to the detriment of the party that should have carried it out, the Constitutional Court found that in the disputed judgment the Pula County Court violated the applicant's right to a fair trial, guaranteed in Article 29.1 of the Constitution.

The Constitutional Court overturned the disputed judgment and referred the case back to the Pula County Court for fresh consideration, placing it under an obligation (pursuant to Articles 31.1, 32.2 and 32.4 of the Constitutional Act on the Constitutional Court) to hand down a judgment in compliance with the legal opinion of the Constitutional Court, expressed in

Decision no. U-III-1243/2004 of 19 October 2006. It pointed out that by not heeding the legal views of the Constitutional Court and not respecting the binding legal standards grounded in the case-law of the Constitutional Court in relation to the protection of human rights in a specific legal issue, the Pula County Court acted contrary to Articles 31 and 77 of the Constitutional Act on the Constitutional Court.

#### *Cross-references:*

- Decision no. U-I-697/1995 of 29.01.1997, *Bulletin* 1997/1 [CRO-1997-1-002].

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2010-2-009

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 04.06.2010 / **e)** U-VIIA-2757/2010 / **f)** / **g)** *Narodne novine* (Official Gazette), 72/10 / **h)** CODICES (Croatian, English).

#### *Keywords of the systematic thesaurus:*

4.9.6 Institutions – Elections and instruments of direct democracy – **Representation of minorities.**  
4.9.7.2 Institutions – Elections and instruments of direct democracy – Preliminary procedures – **Registration of parties and candidates.**

#### *Keywords of the alphabetical index:*

Election, candidate list, minimum signatures / Election, candidate, registration procedure / Election, electoral code / Election, list of candidates / Election, local, candidate / Election, municipality / Election, preparatory procedure.

#### *Headnotes:*

There is no provision in the electoral law to the effect that the performance of any action in election proceedings can be achieved in the absence of the voter, whether this is done by an authorised proxy or through any form of oral authorisation.

### Summary:

I. The Croatian Party of State Right, Zemunik Donji branch (the appellant) lodged an appeal for the protection of electoral rights, challenging the decision of the Zadar County Electoral Commission (hereinafter, the "CEC") of 28 May 2010.

In this decision the CEC rejected as groundless the appellant's objection to the candidacy of Dragan Daničić for deputy prefect of the Zemunik Donji Municipality, elected by members of the Serb national minority. The candidate was nominated by the Independent Democratic Serb Party (hereinafter, the "SDSS").

The appellant suggested there had been illegality and irregularity in the collection of voter signatures (it was suggested that one spouse signed on behalf of the other, or that voters had given authorisation to other voters over the telephone, to sign for and thus to support a particular candidate) which were necessary for the validity of Dragan Daničić's candidacy. In the appellant's view, this state of affairs was in gross violation of the candidacy procedure laid down in the Act on Elections for Municipal Prefects, Mayors, County Prefects and the Mayor of the City of Zagreb (referred to here as the Act).

Pursuant to Articles 20 and 22 of the Constitutional Act on the Rights of National Minorities, Article 30.2 of the Government Act, Article 6.2 of the Act and Articles 41.3, 41.5 and 41.6 of the Local and Regional Self-government Act, the Government passed the Decision to call Supplementary Elections for Deputy Municipal Prefects, Mayors and County Prefects. Sunday 13 June 2010 was designated as the date for the supplementary elections. Under point 4 of the Decision it was stipulated that in the Zemunik Donji Municipality (Zadar County) supplementary elections were to be held for a deputy municipal prefect, representative of the Serb national minority.

As Zemunik Donji Municipality has more than 1,000 inhabitants, and less than 10,000 inhabitants, one hundred voter signatures were necessary to validate party or independent candidacies for the election of deputy municipal prefect, representative of the Serb national minority. Only one nomination was received in the candidacy proceedings. This was the proposal of the SDSS, nominating the candidate Dragan Daničić. Attached to this proposal were eight pages of the form DLSN-1 with a total of one hundred and seven voters' signatures.

II. The Constitutional Court found that the CEC wrongly determined the number of valid signatures within the meaning of the Local and Regional Self-

government Act. Article 41.7 stipulates that at supplementary elections, fifty signatures are needed for a valid candidacy in municipalities of up to 1,000 inhabitants, and in the remaining municipalities, cities and counties one hundred signatures from members of national minorities, if the supplementary elections are being held to ensure the right to deputies from among the national minority. Article 15.2.2 states that for valid party and independent candidacies, one hundred signatures are needed for the municipal prefect and one deputy in a municipality of over 1,000 inhabitants and less than 10,000 inhabitants. Article 16 provides that voter signatures are gathered on a statutory form. The form, in addition to the voter's signature, must show the voter's forenames and surname, address, and the number of his or her valid identity card and the place of issue.

The Court observed that there is no provision in the Act (or, indeed, in any other national electoral legislation) which would allow any action in the election process; including candidacy procedures, to be carried out in the absence of the voter, whether through an authorised proxy or through any form of oral authorisation (by telephone, for example).

The Constitutional Court noted that the procedure for the realisation of the passive electoral rights of illiterate and physically handicapped persons is set out in Article 59.1 and 59.2 of the Act. These provisions require their presence. The fact that in this case, six days after the end of the candidacy process, some voters handed in written statements confirming that they had orally empowered their spouses to sign the DLSN-1 form in their absence and to support candidate Dragan Daničić in their name, does not affect the finding of the Constitutional Court as to the legal non-validity of these voters' signatures, even if the statements were valid. Noting that four voters who handed in written statements were illiterate, the Constitutional Court pointed out that the State Electoral Commission had issued many binding instructions about voting procedures for illiterate persons, physically handicapped persons and persons who are unable to attend the polling station. These instructions clearly state that such voters must be present in person when voting takes place. This rule also applies to candidacy procedures, including signatures supporting the mandate of a particular candidate.

The Constitutional Court concurred with the findings of the CEC to the effect that the signatures under nos. 69 and 70, 96 and 97 and 105 and 106 on the DLSN-1 form are in dispute, as the identical handwriting on these "pairs" of signatures may be clearly discerned, without resorting to professional handwriting expertise. The Constitutional Court also concurred with the



appellant's objection regarding the signatures under nos. 37 and 38. There too the identical handwriting can be clearly discerned, without professional handwriting expertise. It was impossible to establish which signature in the above "pairs" of signatures was valid, and therefore to determine which voters voted in person. The Constitutional Court held that under the principle of legal security, both signatures in the "pair" should be found null and void.

The Constitutional Court concluded that out of a total of one hundred and seven voter signatures on the DLSN-1 form supporting the nomination of candidate Dragan Daničić, a total of fifteen voter signatures could not be deemed valid. The remaining ninety-two voter signatures were to be deemed valid.

Under Article 20.1 of the Act, the competent electoral commission is under an obligation to verify whether each candidacy it receives is in accordance with the provisions of the Act and the binding instructions of the State Electoral Commission. The electoral commission must, therefore, assess the elements of the candidacy that can be objectively verified, such as whether the candidacy was submitted by somebody authorised to do so, whether statements from the candidate and the deputy as to their acceptance of the candidacy are enclosed with the candidacy, whether enough valid voter signatures have been gathered, and whether all the other data required by law has been given in addition to the voter signatures.

The Constitutional Court found that in this case the Municipal Electoral Commission of the Zemunik Donji Municipality (the MEC) omitted to assess, at the moment when it received this particular candidacy, whether it was accompanied by enough valid signatures. (One hundred were needed). The competent CEC failed to correct that omission.

It therefore upheld the appellant's appeal and overturned the disputed ruling of the MEC of 28 May 2010 and the collective list of valid candidacies for the election of the deputy municipal prefect of the Zemunik Donji Municipality who is to be elected by members of the Serb national minority, which was determined on 24 May 2010 by the MEC.

In accordance with Articles 20.1 and 88.1 of the Act, the SDSS (which put forward the Dragan Daničić candidacy) was asked to remove the various deficiencies by handing over to the MEC, within twenty-fours of receipt of this decision, a DLSN-1 form with the valid signatures of at least another eight voters.

### *Languages:*

Croatian, English.



### *Identification:* CRO-2010-2-010

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 07.07.2010 / **e)** U-III-3491/2006 *et al* / **f)** / **g)** *Narodne novine* (Official Gazette), 90/10 / **h)** CODICES (Croatian, English).

### *Keywords of the systematic thesaurus:*

3.9 General Principles – **Rule of law**.  
3.16 General Principles – **Proportionality**.  
3.17 General Principles – **Weighing of interests**.  
5.3.39.2 Fundamental Rights – Civil and political rights – Right to property – **Nationalisation**.

### *Keywords of the alphabetical index:*

Housing, procedure, privatisation / Property, private, right / Property, protection / Property, value, reduced / Ownership, right, restriction / Constitutional Court, jurisprudence / Constitutional Court, decision, execution, method.

### *Headnotes:*

When the Academy of Sciences and Arts was compelled to sell the flats it owned for less than the market value, its constitutional right to ownership was breached, as it had to shoulder a disproportionate burden in relation to the legitimate aim which was to have been achieved by the Sale to Occupier Act. This led to an excessive imbalance between the protection of the public interest established by the Sale to Occupier Act and its effects on the applicant. The legislator's task was to ensure that all tenants could purchase socially-owned flats under conditions more favourable than market conditions, without creating differences in the person of the seller which would make it more difficult or impossible for some of the tenants to buy the flats. However, because the legislator itself, by special legislation, reinstated the applicant's ownership over its immovable property which had been confiscated earlier, it should also have ensured that an excessive burden was not imposed on the applicant in relation to the aim that

was to have been achieved by the Sale to Occupier Act. The protection of the applicant's ownership rights, in relation to other transitional regulations, should have consisted of exercising a right to compensation in the amount of the market value of the flats.

### *Summary:*

I. The Academy of Sciences and Arts (hereinafter, the "CASA") lodged three constitutional complaints against the judgments of competent courts passed in three sets of civil proceedings conducted in order to pass judgments that would replace sale contracts for flats with specially protected tenancies. Under these judgments, the applicant (the respondent in the civil proceedings) sold flats to the plaintiffs (the specially protected tenants) under the conditions in the Specially Protected Tenancies (Sale to Occupier) Act (hereinafter, the "SOA"). Under the judgments the applicant was obliged to sell its flats at less than market value.

Since all three cases before the Constitutional Court involve the same legal matter (the relationship between the SOA and the Academy of Sciences and Arts Act – the CASA Act), and since they all deal with the same issue of constitutional law (the alleged violation of the constitutional right to ownership by judgments which replace contracts of sale for flats with specially protected tenancies), the Constitutional Court decided to join the cases and adjudicate on them by a single decision.

One of the points the applicant made in the constitutional complaints was that the flats could not be sold pursuant to the SOA, because they were not socially owned property but were entered in the land registry as the applicant's property, not as a result of ownership transformation but on the grounds of Article 27 of the CASA Act. It deemed that its constitutional rights guaranteed in Articles 48.1, 50 and 29.1 of the Constitution had been violated.

II. The Constitutional Court noted that social ownership was the essential feature of the former state and its regime. After the Republic of Croatia became independent and after the Constitution entered into force on 22 December 1990, private ownership over socially-owned real property began to be reinstated on various grounds. The Constitution guarantees the right to ownership to everyone, and it put its inviolability among the highest values of the constitutional order and as grounds for interpreting the Constitution.

The SOA entered into force on 19 June 1991, signalling the beginning of the harmonisation of the housing regulations with the Constitution. The Lease of Flats Act entered into force on 5 November 1996. These regulations allowed certain persons who were specially protected tenants under certain defined conditions to buy certain flats. Those persons who were specially protected tenants but were unable for certain reasons to buy the flat they were occupying, had their specially protected tenancy "transformed" into a lease and became protected lessees. Article 2 of the SOA states that its provisions extend to flats where the ownership has been transformed under special regulations. In earlier case-law the Constitutional Court started from the view that Article 2 of the SOA refers both to transformations effected before the entry into force of the SOA and to those that took place after it came into force, including the CASA Act (Decision no. U-III-777/1996 of 19 November 1997).

The legislator drew a distinction between the CASA and other subjects whose property had been confiscated and who were the potential beneficiaries of restitution of or compensation for property. It passed a separate act pursuant to which the applicant, without any restrictions stipulated in this act, regained the property that the former state had taken away. Article 27 of the CASA Act provides that the applicant is the owner of immovable property, libraries, scientific and artistic collections and other movable property which it had acquired by donation, bequest or in other ways. This includes property it had acquired since its foundation in 1866, including the immovable property which was confiscated under the former regime and turned into socially-owned property which it was entitled to use.

The Constitutional Court was of the opinion that compelling the applicant to sell its flats for less than the market value in accordance with the SOA constituted interference in the applicant's property right amounting to a restriction of ownership by decreasing the value of the property.

The Constitutional Court noted that the SOA and the CASA Act are transition regulations passed within a period of one month. Both have a legitimate aim but they have created a conflict of interest, between the interest of the State in privatising socially-owned flats and enabling all its citizens to buy flats under more favourable conditions, thereby resolving their housing problems and the interest of the citizens, the specially protected tenants, in purchasing the flats they occupy under favourable conditions. This is in opposition to the applicant's interest in freely enjoying its possession of the property returned to it under Article 27 of the CASA Act.

If priority is accorded to one of these conflicting interests, this must be based on the Constitution and comply with the standards in the protection of the right to ownership developed in the case-law of the Constitutional Court and the European Court of Human Rights. In this case the civil courts gave priority to the interests of the tenants and the Supreme Court based its view on a formal-logical interpretation of the applicable legal norm according to the rule of *lex posterior*. Specifically, the SOA entered into force a month and five days before the CASA Act. The Supreme Court took the view that the flat in question was socially-owned property at the moment when the SOA entered into force, and could accordingly be sold, because the CASA Act entered into force after the SOA and “did not retroactively change the legal regime of social ownership in CASA ownership”.

In the view of the Constitutional Court, this approach to weighing two conflicting interests, in the context of the transformation of social ownership into private ownership, is not acceptable under constitutional law. In passing the CASA Act the legislator expressed the will to restore to the applicant property that had been appropriated from it without any restrictions prescribed in that act. In this sense the “transitional” character of Article 27 of the CASA Act differs from that of other special transitional legislation, and this is the light in which the position of the applicant should also be viewed, in relation to all those whose ownership was transformed under other special regulations, which also refers to the SOA.

The Constitutional Court noted that so far, the applicant has had to sell its flats, which it acquired *ex lege* under favourable conditions, in at least 30 cases (including the three under dispute). The Constitutional Court has rejected the applicant’s constitutional complaints in at least twelve of its decisions up to February 2009, taking the view that Article 2 of the SOA (which states that the act’s provisions also cover flats for which transformation of ownership was carried out under special regulations) refers to transformations carried out both before and after the SOA came into force, and this included the CASA Act. Taking this stand, the Constitutional Court did not view these cases in sufficient depth in the light of European constitutional standards, (i.e. in the light of the European Court’s view as to the extent and content of the right to the peaceful enjoyment of possessions, Article 1 Protocol 1 ECHR). The Constitutional Court has been applying these standards in its case-law since July 2009 (Decision no. U-IIIB-1373/2009). Applying to this case the standpoints of the Constitutional Court and the European Court of Human Rights, and bearing in mind the facts mentioned above, the Constitutional

Court found that because the applicant has had to sell at least 30 of the flats it owned at less than market value, it has had to shoulder a disproportionate burden in relation to the legitimate aim that was to have been achieved by the SOA. This has led to an excessive imbalance between the protection of the public interest established by the SOA and its effects on the applicant.

The Constitutional Court pointed out that the legislator’s task was to ensure that all tenants could purchase socially-owned flats under conditions more favourable than market conditions, without creating differences in the person of the seller which would make it more difficult or impossible for some of the tenants to buy the flats. This also applies to specially protected tenants in the flats which became the applicant’s property on the grounds of Article 27 of the CASA Act. However, when the legislator enacted special legislation to reinstate the applicant’s ownership over its immovable property which had been confiscated earlier, he should have ensured that an excessive burden was not imposed on the applicant in relation to the aim that was to have been achieved by the SOA. The protection of the ownership rights established in the CASA Act, in competition with other transitional regulations, should have consisted in making sure that the HAZU (Academy of Sciences and Arts) was compensated for the flats in the amount of the market price of the flats. Such compensation, did not, however, have to be given by the tenants – the buyers of the flats.

The Constitutional Court did not overturn the court judgments, but it identified a breach of the right to ownership and ordered the Government to redress the effects of the violation of the applicant’s constitutional right.

#### Cross-references:

- Decision no. U-IIIB-1373/2009 of 07.07.1997, *Bulletin* 2009/2 [CRO-2009-2-010].

#### Languages:

Croatian, English.



# Czech Republic

## Constitutional Court

### Statistical data

1 May 2010 – 31 August 2010

- Judgments of the Plenary Court: 10
- Judgments of panels: 53
- Other decisions of the Plenary Court: 9
- Other panel decisions: 1 053
- Other procedural decisions: 43
- Total: 1 168

### Important decisions

*Identification:* CZE-2010-2-005

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 20.04.2010 / **e)** Pl. ÚS 6/10 / **f)** On the obligation to release the defendant from custody upon pronouncement of a judgment of acquittal / **g)** *Sbírka zákonů* (Official Gazette), 163/2010; *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** <http://nalus.usoud.cz>; CODICES (Czech).

*Keywords of the systematic thesaurus:*

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**

5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**

5.3.13.3.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – **Habeas corpus.**

*Keywords of the alphabetical index:*

Acquittal, effects / Remand in custody / Public prosecutor / Suspensive effect.

*Headnotes:*

It is not acceptable from a constitutional perspective for limitation of personal freedom by custodial detention to remain in effect after handing down of a judgment of acquittal. Continued limitation of personal freedom in such circumstances ceases to be justifiable on the grounds of public interest in the effective prosecution of criminal behaviour because the requirement of relevant and sufficient grounds for continuing custody or “intensified grounds” has not been met. Therefore, § 74.2 of the Criminal Procedure Code (in the part of the second sentence after the semi-colon) ran counter to those requirements and had to be deemed unconstitutional.

*Summary:*

I. The Constitutional Court had been asked to decide on a constitutional complaint in which the complainant was seeking the annulment of a resolution of the High Court in Prague which left him in custody upon a complaint of the state prosecutor, despite the court of first instance having already issued a judgment of acquittal. In its deliberations over the constitutional complaint, Panel II of the Constitutional Court did not consider to be constitutional § 74.2 second sentence (the part after the semi-colon) of the Criminal Procedure Code. It was suggested that this provision ran counter to the requirement for proportionality of limitation of personal freedom and the requirement to prove the presence of intensified grounds for additional limitation of personal freedom by custody arising from previous Constitutional Court case-law (Judgment file no. IV. ÚS 689/05) and the case-law of the European Court of Human Rights (*Wemhoff v. Germany* of 27 June 1968, *Labita v. Italy* of 6 April 2000, and *Rokhlina v. Russia* of 7 April 2005).

The plenum of the Constitutional Court directed the repeal of the challenged provision of the Criminal Procedure Code due to conflict with Article 5.1.c and 5.3 ECHR. The Constitutional Court also decided that following the issue of a judgment of acquittal, the defendant should always be released immediately. A complaint by the state prosecutor concerning the defendant’s release from custody following his or her acquittal did not have a suspensive effect.

II. The Constitutional Court stated that under Article 1.1 of the Constitution, the Czech Republic is a state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. Therefore, in criminal proceedings, maximum protection must be accorded to an individual’s rights and freedoms and consideration had to be given to the extent that the public interest may legitimately limit a particular defendant’s fundamental rights in such proceedings. It

was also necessary to take into consideration Article 8 of the Charter and Article 5 ECHR, which govern the issue of an individual's personal freedom and limitations on them.

The Constitutional Court noted that custody is an extraordinary measure entailing limitation of personal freedom and should be imposed only if there is no other possibility of addressing the particular concern for which it may be ordered. Interference in personal freedom must always be considered in terms of time, and, as custody is an exceptional institution, it can only last for as long as is strictly necessary. The fundamental principles for limiting personal freedom include the necessity for imposing custody and holding someone only for a certain legitimate purpose, the proportionality between the individual's personal freedom and the interest of the society in its limitation, the necessity of limiting personal freedom in the absence of other means for achieving the same purpose, balancing the benefits of the limitation in view of the losses arising from it and the exclusive decision-making authority of the Court.

The Constitutional Court also referred to the doctrine of intensified grounds which evolved in the case-law of the European Court of Human Rights. Under this doctrine, a court deciding on custody must take into account whether the suspicion of committing the crime with which the defendant is charged is strengthened or weakened. Thus, it is possible to conclude from the European Court of Human Rights' case-law that, if the Court of first instance has issued a judgment of acquittal, the defendant must be released immediately even if the state prosecutor had appealed. If the defendant is not released, there is violation of the right to personal freedom guaranteed by Article 5.1 ECHR. In the Constitutional Court's opinion, the statutory regulation of the Criminal Procedure Code authorising the state prosecutor to file a complaint with suspensive effect therefore conflicted with narrow interpretation of Article 5.1.c in conjunction with Article 5.3 ECHR.

A continued limitation of personal freedom following the issue of an acquittal judgment ceases to be justifiable on grounds of public interest in effective prosecution of criminal activity because the requirement of intensified grounds for continuing custody has not been met. Issuance of the acquittal judgment extinguishes these grounds. Being found not guilty of a charge is the point in criminal proceedings when the grounds for keeping a person in custody have disappeared or have been reduced to a minimum; as the charge has been shown to be unjustified by a court verdict, there is no public interest in continuing custody that could conflict with the requirement to respect personal freedom. If the

court has an obligation to decide whether the suspicion of commission of a crime is strengthened or weakened, then in connection with the issuing of an acquittal judgment, the grounds for suspicion are refuted by the court's own decision that the accusations were unjustified. The suspensive effect of a complaint by the state prosecutor creates a situation whereby the individual is asked for a greater sacrifice than can reasonably be requested from somebody who has the benefit of the presumption of innocence. Therefore, the Constitutional Court stated that custody could not be extended through the suspensive effect of a decision to release a defendant arising from an appeal by the state prosecutor; such an interpretation would result in impermissible interference in the defendant's right to personal freedom.

III. The judge *rapporteur* in the matter was Eliška Wagnerová. None of the judges filed a dissenting opinion.

#### *Languages:*

Czech.



#### *Identification: CZE-2010-2-006*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 04.05.2010 / **e)** Pl. ÚS 7/09 / **f)** On the principle of proportionality when weighing the obligations arising from international law and the right to defence / **g)** *Sbírka zákonů* (Official Gazette), 226/2010; *Sbírka zákonů* (Official Gazette), *Sbírka náleží a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** <http://nalus.usoud.cz>; CODICES (Czech).

#### *Keywords of the systematic thesaurus:*

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

2.2.1.1 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Treaties and constitutions.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**

5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

*Keywords of the alphabetical index:*

Defence, right / Information, classified, protection / NATO / National Security Council.

*Headnotes:*

A conflict between the right to defence and the state's interest in protecting classified information, which is affected by the constitutional law obligation of the Czech Republic to observe obligations incumbent upon it under international law, must be evaluated on the basis of the principle of proportionality and that of giving priority to a constitutional interpretation over derogation.

*Summary:*

I. The plenum of the Constitutional Court, in its Judgment of 4 May 2010, denied a petition from the Municipal Court in Prague seeking the annulment of § 58.6 of Act no. 412/2005 Coll., on Protection of Classified Information and on Security Clearance. The municipal court had been conducting criminal proceedings against the defendants who were alleged to have committed the crime of endangering classified information. The first defendant, as an employee of the Czech Ministry of Defence, revealed part of a directive of the North Atlantic Treaty Organisation (hereinafter, "NATO") to the second defendant who was alleged to have used the information in her business activities. The file included two appendices, which were NATO classified information and which were to serve as evidence in the main trial.

According to the petitioner, the contested provision rendered impossible both the defendants' right to defence and the presentation (by reading) of evidence which is subject to the relevant degree of classification of a foreign power at the main trial. Such presentation of evidence was rendered impossible because during the criminal proceedings in which information classified by a foreign power was discussed, the defendants and their counsel, if they did not hold valid clearance issued by the National Security Office, could not have access to the documentary evidence.

II. The Constitutional Court noted in its judgment that the right to defence was one of the most important fundamental rights of persons who are being prosecuted in criminal proceedings and is intended to achieve a just decision issued not only in the name of the person prosecuted, but also in the interest of a democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. Referring to its previous decisions, the Constitutional Court stated that the constitutionally guaranteed right to defence and the presumption of innocence were fundamental requirements for a fair criminal trial and these constitutional guarantees were reflected in the Criminal Procedure Code, which was, in accordance with the Constitution, constructed on the principle of priority of choice of defence counsel which the defendant can exercise at any stage of an ongoing proceeding. If evidence was presented in a criminal trial which the defence counsel and defendant were not acquainted with, it could not be taken into account due to violation of a fair trial.

In line with its previous judgments, the Constitutional Court stated that in this case the conflict between the right to a defence and the state's interest in protecting classified information was affected by the constitutional law obligation of the Czech Republic to observe the obligations incumbent on it under international law. Constitutional law evaluation of the contested provision is based on application of the principle of proportionality and on the principle of preferring constitutional interpretation over derogation.

In the Agreement between the Parties to the North Atlantic Treaty for the Security of Information of 6 March 1997, NATO member states agreed to protect and secure classified information originating from NATO and ensure that all persons who are their citizens and who must or might have access to information classified as confidential and higher were appropriately cleared before fulfilling their obligations. The Czech Republic, which took over international obligations vis-à-vis its allies concerning classification of certain important and sensitive information fulfilled its obligation by transferring these international obligations through § 58.6 of Act no. 412/2005 Coll. into domestic law in order to ensure classification of appropriate information of a foreign power.

Annulment of § 58.6 of Act no. 412/2005 Coll. would not create a discretion to allow access to classified NATO information; that would continue to be under the protection of a valid international treaty and the obligation arising from it under Article 1.2 of the Constitution. It would be necessary to state that the principles of a fair trial and presumption of innocence also apply to this case so that bodies responsible for criminal proceedings may not use as evidence

anything to which the defence would have been denied access. An international obligation has precedence and it is up to the bodies responsible for criminal proceedings to decide whether they are able to conduct criminal proceedings while observing it or whether they will have to forego the proceedings.

III. The judge *rapporteur* in the matter was Vlasta Formánková. None of the judges filed a dissenting opinion.

#### Languages:

Czech.



#### Identification: CZE-2010-2-007

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 08.06.2010 / **e)** Pl. ÚS 3/09 / **f)** On inspection of other premises and plots of land / **g)** *Sbírka zákonů* (Official Gazette), 219/2010; *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** <http://nalus.usoud.cz>; CODICES (Czech).

#### Keywords of the systematic thesaurus:

4.7.4.3.1 Institutions – Judicial bodies – Organisation – Prosecutors / State counsel – **Powers**.

5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings**.

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home**.

#### Keywords of the alphabetical index:

Home, inviolability / House, search / Criminal proceedings, guarantee / Public prosecutor, powers / Pre-trial, procedure.

#### Headnotes:

It is possible to cause as much interference in an individual's private sphere, by an inspection of his or her premises (including agricultural buildings and land) as can be caused by an inspection of his or her

home. Such interference therefore requires prior consent of a court.

#### Summary:

I. In related proceedings on a constitutional complaint the Constitutional Court reviewed the question of the legality of house inspection and inspection of other premises. Panel II of the Constitutional Court did not consider it constitutional for the Criminal Procedure Code, as the statutory regulation governing this procedure in criminal matters (§ 82 *et seq.*), to set out conditions allowing for the breach of every individual's right to privacy by the conduct of a house inspection (§ 83) in a stricter fashion than is applicable to an inspection of other premises and plots of land (§ 83a), although an inspection of other premises undoubtedly also constitutes an infringement on the right to privacy. It accordingly found § 83a.1 of the Criminal Procedure Code to be inconsistent with the constitutional order and requested the plenum of the Constitutional Court to direct the repeal of the provision.

The plenum of the Constitutional Court annulled in § 83a.1 of Act no. 141/1961 Coll., on Criminal Court Proceedings (the Criminal Code) part of the first sentence and the second sentence which read "in preparatory proceedings, the state prosecutor or the police body...the police body requires prior consent of the state prosecutor thereto."

II. The Constitutional Court first outlined the points of reference for reviewing the petition. Limitations on personal integrity and privacy (i.e. breach of respect for them) by the state authority are only permissible in exceptional cases, and only if they are necessary in a democratic society and if the purpose pursued by the public interest cannot be achieved otherwise. A house inspection or inspection of other premises involves limitation of an individual's fundamental right to the inviolability of his dwelling. In this regard, the Constitutional Court referred to Article 12.1 of the Charter under which "a person's dwelling is inviolable. It may not be entered without the permission of the person living there" and the European Convention on Human Rights, Article 8.1 ECHR which states that "everyone has the right to respect for his private and family life, his home and his correspondence" and the International Covenant on Civil and Political Rights (hereinafter, the "ICCPR") which in Article 17 guarantees the individual a fundamental right protecting him or her against "arbitrary or unlawful interference with his privacy, family, home or correspondence." The Constitutional Court also recapitulated several conclusions of the doctrine, the case law of the German Constitutional Court, the case-law of the European Court of Human Rights and some of its own decisions.

Upon the above points of reference, the Constitutional Court stated that the interpretation of the right to privacy in terms of space, i.e. the right to respect for and protection of one's dwelling from outside interference, was not limited to protection of premises that are used for living. The right to respect and protection of a dwelling, together with the right to inviolability of the person and privacy and with the right to protection of personal freedom and dignity, is considered an inseparable part of every individual's private sphere. The maxims arising from the constitutional order of the Czech Republic require that decisions to issue an order to inspect other premises and plots of land are made by an independent and impartial body. The state prosecutor cannot be considered as one, even less so a police body.

The Constitutional Court also stated that autonomous fulfilment of private life and work or other interests were closely related and one could not draw a clear distinction separating privacy in places used for living from privacy created in places and environments that are used for work or business activities or for satisfying one's personal needs or interests (hobbies). In this regard the Constitutional Court also analysed the term "dwelling" in its narrow and broad sense and stated that as regarded unfenced lands, such as forests or meadows, a distinction was needed between entering them and "inspecting" them, which is related to interference in the integrity of that real estate because private life can also take place within such premises. Therefore, such inspection must be subject to the same regime as the inspection of enclosed premises.

With regard to the wider understanding of the term "dwelling," the Constitutional Court stated that, as in the case of house inspection, where other premises, such as agricultural buildings or land are to be inspected, there is necessarily interference in the individual's private sphere defined in terms of space. Such interference requires prior consent of a court. This requirement is of particular significance as the Criminal Procedure Code does not permit subsequent court review of a court order to inspect other premises and plots of land. Thus, these acts, constituting obvious interference in the fundamental right to a private life, take place outside any direct judicial review.

The Constitutional Court stated that the contested parts of § 83a.1 of the Criminal Procedure Code could not be considered constitutional because they clearly violated the constitutional law limits mentioned above (Article 12.1 of the Charter, Article 8.1 ECHR and Article 17 ICCPR).

III. The judge rapporteur in the matter was Eliška Wagnerová. Dissenting opinions to the verdict and the reasoning of the judgment were filed by judges Jan Musil, Michaela Židlická and Vladimír Kůrka. Their dissenting opinions were based on the statement that "other premises" did not enjoy special protection under the constitutional order and international treaties; neither was court consent of any kind necessary (and certainly not prior consent). The dissenting judges conceded that "private life" could also take place in these premises, but in a sporadic and episodic fashion. The dissenting opinions also cast doubt on the case-law of the European Court of Human Rights; the conclusions arrived at by the majority of the Court did not follow from it.

#### *Languages:*

Czech.



#### *Identification: CZE-2010-2-008*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 01.07.2010 / **e)** Pl. ÚS 9/07 / **f)** On the postponed restitution of church property and inactivity on the legislator's part / **g)** *Sbírka zákonů* (Official Gazette), 242/2010; *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** <http://nalus.usoud.cz>; CODICES (Czech).

#### *Keywords of the systematic thesaurus:*

3.7 General Principles – **Relations between the State and bodies of a religious or ideological nature.**

5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

#### *Keywords of the alphabetical index:*

Church, property, restitution / Legitimate expectation, protection, principle / Legislative omission / Religion, religious activity, freedom.



*Headnotes:*

A provision of the Act on Land had come into dispute. Although the provision itself could not be deemed unconstitutional, it was found that legislative arbitrariness consisting of long-term failure to adopt a promised statutory regulation of church restitution is unconstitutional. This state of affairs is not only inconsistent with the principles of a democratic state governed by the rule of law, but it also represents an interference in property rights protected by Article 11 of the Charter and Article 1 Protocol 1 ECHR as well as an interference in freedom of religion, the right to freely express one's religion or faith, and the right of churches and religious societies to manage their affairs under Articles 15 and 16 of the Charter.

*Summary:*

I. In a Judgment of 1 July 2010, the Constitutional Court rejected a petition from a group of senators seeking the annulment of § 29 of Act no. 229/1991 Coll., on Ownership of Land and Other Agricultural Property. At the same time, the Court also granted the petition to the effect that it stated that the long-term inactivity of Parliament, consisting of its failure to adopt a special legal regulation to settle the ownership of the historical property of churches and religious societies was unconstitutional and violated Article 1 of the Constitution, Articles 11.1, 11.4, 15.1, 16.1 and 16.2 of the Charter and Article 1 Protocol 1 ECHR.

The applicants did not consider unconstitutional the actual text of § 29 of the Act on Land which provides that property originally owned by churches or religious orders and congregations cannot be transferred to the ownership of other persons until statutes have been adopted concerning that property. However, they did consider unconstitutional the fact that, as a result of long-term inactivity by the legislator, the legitimate expectations established by this provision were not met. They deemed this to be inconsistent with the requirement of legal certainty (Article 1.1 of the Constitution) as § 29 of the Act on Land does not create certainty in legal relationships. Rather, by postponing statutory regulation to an uncertain point in the future, it introduces an element of uncertainty into legal relationships. The provision was also alleged to create inequality in ownership because some owners (namely municipalities) were unable to dispose of their property for a long time.

II. The Constitutional Court concluded that the purpose of the contested provision was not simply to "block" a certain part of state property (and certain other property listed as belonging to third parties, specifically municipalities). The essence of the

contested provision must be seen primarily in the legislator's commitment to adopt, by a certain deadline, a legal regulation settling the ownership of historical property of churches and religious societies that will take into account the objective special features of the subject matter and fulfill § 29 of the Act on Land.

The purpose of § 29 of the Act on Land must be seen in the context of the basic values of restitution and rehabilitation legislation and the case law of the Constitutional Court. Annuling § 29 of the Act on Land would permit the transfer of the historical property of churches to third parties which would fundamentally endanger, if not render impossible, property settlement through restitution in kind (as one of the key methods for mitigating property injustices). Therefore, the Constitutional Court did not find grounds for granting the petition to annul the contested provision because this provision is not unconstitutional. The purpose and the means contained in the contested provision stand up to a review in terms of constitutional principles.

However, the urgency of the public interest to eliminate legal uncertainty arising from the interim state of law has now gone beyond tolerable and justifiable limits. Failure to adopt a special law within nineteen years is a manifestation of unacceptable legislative arbitrariness and violates Article 1.1 of the Constitution. The Constitutional Court stated that apart from the explicit statutory basis in § 29 of the Act on Land the legitimate expectation of churches and religious societies were also based upon the overall concept of the restitution process after 1989. Legitimate expectation is a property interest that falls under Article 11 of the Charter and Article 1 Protocol 1 ECHR. Thus, the impossibility of exercising this property interest (or of receiving compensation) within a period of nineteen years falls within the category of unconstitutionality consisting of failure to legislatively address a systematic and complex problem which has been repeatedly pointed out to the legislator by the Constitutional Court. In the Constitutional Court's opinion, this interference (inactivity) could have had legitimate purpose for a certain transitional period at a time when fundamental measures for social transformation were being adopted, but it could not be sustained indefinitely.

The Constitutional Court also stated that Article 2.1 of the Charter guaranteed religious plurality and religious tolerance, i.e. the separation of the state from specific religious faiths. The principle of religious pluralism and tolerance is stated in Articles 15 and 16 of the Charter. The central principle of a religious neutral state is implemented through a cooperative model for the relationship between the state and churches and their

independence from each other. The lack of settlement of historical church property when the state, as a result of its own inactivity, continues to be the dominant source of income for the affected churches and religious societies, and in the absence of any apparent connection to revenues from the historical property of the churches retained by the state is a situation which violates Article 16.1 of the Charter as regards freedom to express one's religion in society through public actions and traditional forms of religiously motivated socially- beneficial activities that make use of the appropriate historical economic resources. In particular, it violates Article 16.2 of the Charter, in terms of the economic aspect of religious autonomy.

III. The judge rapporteur in the matter was Ivana Janů. Dissenting opinions to both verdicts were filed by judges Pavel Rychetský and Vladimír Kůrka. A dissenting opinion to the verdicts and reasoning was filed by judges Jiří Mucha and Jan Musil.

The dissenting judges argued in favour of granting the petition and annulling the provision in question, although only with regard to the length of time for which the property has been blocked. They argued that the legislator should be given a sufficiently long time to adopt a solution for handling the historical property of churches. They disagreed with the argument that the provision established legitimate expectations on the part of the churches. Vladimír Kůrka also pointed out that the statement concerning inactivity was raising the risk of a judicial solution to restitution because it was tied to related complaints for handover of property or compensation of damages.

#### *Languages:*

Czech.



#### *Identification:* CZE-2010-2-009

**a)** Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 12.07.2010 / **e)** IV. ÚS 3102/08 / **f)** On the voting rights of persons whose legal capacity has been restricted or who have been deprived of it / **g)** *Sbírka zákonů* (Official Gazette); *Sbírka nálezů a usnesení* (Collection of decisions and judgments of the Constitutional Court) / **h)** <http://nalus.usoud.cz>; CODICES (Czech).

#### *Keywords of the systematic thesaurus:*

5.1.1.4 Fundamental Rights – General questions – Entitlement to rights – **Natural persons.**

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**

#### *Keywords of the alphabetical index:*

Legal capacity, restricted / Right to vote.

#### *Headnotes:*

Limiting the voting rights of persons who have been deprived of legal capacity pursues a legitimate aim. However, the general courts, when deciding on deprivation (or restriction) of a person's legal capacity, are also required to evaluate the effects of that decision on the person's subjective public law rights (in particular the question whether a particular person is capable of understanding the significance, purpose and effects of elections). Courts must properly justify their decisions in such cases. Failure to observe this obligation, arising from Article 21.1 and 21.3 of the Charter and Article 3 Protocol 1 ECHR and from Article 89.2 of the Constitution, is unconstitutional.

#### *Summary:*

I. The complainant sought annulment of the decision of the general court and the adoption of a verdict to the effect that his constitutionally guaranteed rights were violated by the fact that he could not take part in elections to the Senate of the Parliament of the Czech Republic, and that on 9 December 2008 the Municipality of the District of Brno – Řečkovice and Mokrý Hora denied his application for a correction to the electoral register. The contested decision of the regional court denied the petition seeking a correction of the permanent electoral register (deletion of a note stating there was an impediment to the exercise of the right to vote). The denial was grounded by the fact that the complainant has been deprived of capacity to perform legal acts, which, under the existing legal regulations, is an impediment to the exercise of the right to vote.

According to the complainant, the decision and legal regulation on which it was based are unconstitutional; he pointed out that the right to vote was one of the most fundamental rights in a democratic society. The complainant pointed out that a general denial of the right to vote to all persons who have been deprived of legal capacity was inconsistent with the principle of proportionality, which must be taken into account in

cases of interference in fundamental rights and especially in a right as important as the right to vote.

II. In its judgment, the Constitutional Court first specified that the case involved application of § 4.2.b of Act no. 491/2001 Coll., on Elections to Municipal Representative Bodies, in conjunction with § 28.3 of the same Act, under which deprivation of legal capacity is an impediment to the right to vote. With respect to the principle of generality of the right to vote, the Constitutional Court stated that each imposition of an impediment to the right to vote required rigorous scrutiny, as it may represent interference in the universality of the right to vote. However, the principle of generality of the right to vote, in the sense that “everyone has the right to vote,” is understood as an ideal which electoral systems approach to a greater or lesser degree, but which is not applied absolutely. Therefore, in this matter the Constitutional Court applied the proportionality test which consists of three steps.

In the Constitutional Court’s opinion, the limitation under review pursues a legitimate aim which is to ensure that the electorate is composed of persons who are capable of making rational decisions and understanding the significance, purpose and effects of elections.

In terms of evaluating the need for limitation of the right to vote, it was necessary to decide whether the establishment of deprivation of legal capacity as an impediment to the right to vote is a limitation that is adapted as much as possible to the cited legitimate aim, and whether that aim could be achieved by other means that preserve fundamental rights to a greater degree. The limitation of the right to vote under review applies to all persons who have been deprived of their legal capacity. In order to consider it necessary within the meaning of the second step of the proportionality test, it would have to hold true that no person who has been deprived of legal capacity is able to understand the significance, purpose and effects of elections. Moreover, that fact would have to be reviewed by the general court and justified in every individual case. However, judicial practice does not follow these maxims. General courts do not take into account public law effects of their decisions. Thus, a situation where somebody is deprived of the constitutionally guaranteed right to vote, on the dubious premise that lack of capacity to conclude private law acts also implies lack of capacity to understand the significance, purpose and effects of elections, can arise. Such a general approach, ignoring the unique circumstances of each case, is not permissible in a state governed by the rule of law.

In its judgment, the Constitutional Court stated that, in the context of the current practice of the general courts making decisions on deprivation of legal capacity, this impediment to the right to vote establishes an unconstitutional state of affairs (inconsistent with Article 21.1 and 21.3 of the Charter and Article 3 Protocol 1 ECHR) because a number of people are deprived of the opportunity to vote without their capacity to vote being individually reviewed. In the interest of removing this state of affairs, the general courts, when deciding on deprivation (or restriction) of someone’s legal capacity, are also required to evaluate the impact of that decision on the individual’s subjective public law rights, in particular the question whether a particular person is capable of understanding the significance, purpose and effects of elections. If the person is capable, he or she must not be deprived of legal capacity, but his or her legal capacity may, at most, be proportionately restricted. If the court reaches an opposite conclusion, it must then, independently and properly, give reasons for that conclusion, in a manner that corresponds to the gravity of such interference and the maxims arising from constitutionally guaranteed rights.

The constitutional complaint itself was denied because the complainant can turn to the court with a petition to restore his legal capacity, seeking recognition of his right to exercise his right to vote. From that point of view the complainant’s petition is inconsistent with the subsidiarity principle for Constitutional Court review.

III. The judge rapporteur in the matter was Miloslav Výborný. None of the judges filed a dissenting opinion.

*Languages:*

Czech.



# Denmark

## Supreme Court

---

### Important decisions

*Identification:* DEN-2010-2-001

**a)** Denmark / **b)** Supreme Court / **c)** / **d)** 17.03.2010 / **e)** 257/2007 / **f)** / **g)** *Ugeskrift for Retsvæsen* 2010, 1547 / **h)** CODICES (Danish).

*Keywords of the systematic thesaurus:*

4.4.3.5 Institutions – Head of State – Powers – **International relations.**

4.4.3.6 Institutions – Head of State – Powers – **Powers with respect to the armed forces.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

*Keywords of the alphabetical index:*

Policy, foreign / International law / Applicant, *locus standi* / Right of action.

*Headnotes:*

No right of action was found with regard to the lawsuit against the Prime Minister concerning Danish participation in the Iraq War.

*Summary:*

By decision of 21 March 2003, Parliament gave its consent according to Section 19.2 of the Constitution, to place a Danish military force at the disposal of a multinational operation under American leadership.

A group of citizens, represented by the “Constitution Committee on the Iraq War” sued the Prime Minister. They alleged that the decision by Parliament as to Danish participation in the war violated Section 19.2 of the Constitution, since the war against Iraq was illegal according to international law.

The court of first instance (the Eastern High Court) had dismissed the lawsuit.

The Supreme Court upheld this judgment, since the appellant had no right of action with regard to the lawsuit.

The Supreme Court stated that none of the appellants complied with the general requirements under Danish law with regard to right of action. According to the general rule, a plaintiff must show a legal interest in the outcome of the case arising from a concrete legal dispute. None of the appellants are affected by the decision of the Parliament in any other way than the population in general. This is also true in respect of the appellant who had suffered a serious personal loss since his son had been killed during military service in Iraq. The Court noted in this context that the son participated pursuant to a later decision of the Parliament and under an agreement of voluntary military service in Iraq.

The Supreme Court considered whether the lawsuit could be admitted to be tried on the merits irrespective of the lack of legal interest under general rules, as was the case in the Supreme Court’s Judgment of 12 September 1996 concerning the right of action on the Maastricht Treaty. The Court underlined that the decision of Parliament concerned foreign policy where the Government according to the Constitution has a direct competence to act on behalf of the realm. The Court furthermore underlined that the decision of the Parliament did not entail legal duties for Danish citizens in general, nor – in respect of the question of legal standing – could be considered to be of vital importance to the Danish population in general.

The Supreme Court added that there is no particular ambiguity concerning the understanding of Section 19.2 or 20 of the Constitution. The Court further pointed to the fact that Article 6 ECHR does not give a party a right to have a case decided on the merits if the party has no legal standing.

*Languages:*

Danish.



# Estonia

## Supreme Court

---

### Important decisions

*Identification:* EST-2010-2-007

**a)** Estonia / **b)** Supreme Court / **c)** *En banc* / **d)** 01.07.2010 / **e)** 3-4-1-33-09 / **f)** Request of the Chancellor of Justice to declare Articles 5 and 71 of the European Parliament Election Act, Articles 6 and 67 of the Local Government Council Election Act, and Articles 5 and 73 of the Riigikogu Election Act invalid / **g)** [www.riigikohus.ee/?id=11&tekst=RK/3-4-1-33-09](http://www.riigikohus.ee/?id=11&tekst=RK/3-4-1-33-09) / **h)** CODICES (Estonian, English).

*Keywords of the systematic thesaurus:*

3.3.3 General Principles – Democracy – **Pluralist democracy.**

4.9.8 Institutions – Elections and instruments of direct democracy – **Electoral campaign and campaign material.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

5.3.41.1 Fundamental Rights – Civil and political rights – Electoral rights – **Right to vote.**

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election.**

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

*Keywords of the alphabetical index:*

Debate, political / Advertising, outdoor, prohibition / Election, campaign, restriction / Enterprise, freedom / Ownership right, restriction.

*Headnotes:*

The prohibition on political outdoor advertising is not in conflict with the Constitution, although it interferes with the right to vote, the right to stand as a candidate in conjunction with the freedom of expression, the right to engage in enterprise, the fundamental right of ownership and the freedom of activity of political parties. The legislator is free to abolish the prohibition or to establish restrictions on the time, place and size of political outdoor advertising, and to set a ceiling for election expenses.

*Summary:*

I. In June 2005, the Parliament (*Riigikogu*) passed an Act amending the European Parliament Election Act (EPEA), the Local Government Council Election Act (LGCEA) and the *Riigikogu* Election Act (REA). The Acts were amended by adding a provision which prohibits political outdoor advertising during active campaigning.

In the autumn of the same year, the Chancellor of Justice in a report made a suggestion to the Parliament that it examined the prohibition again and amended the regulation in force. The Parliament repeatedly debated the prohibition between 2006 and 2008 but did not amend the laws regulating it. As a result, the Chancellor of Justice submitted a proposal to the Parliament on 9 June 2008 to bring the regulation in conformity with the Constitution.

Several draft pieces of legislation, initiated by the Constitutional Committee or different factions of Parliament, rendering the disputed provisions void or requiring more detailed accounting of advertising costs and setting a ceiling on election advertising were discussed in Parliament but none were passed. Since the Parliament failed to comply with the proposal of the Chancellor of Justice for more than 18 months, the Chancellor of Justice filed a request with the Supreme Court to declare the legislation in question invalid.

II. The Supreme Court *en banc* first ascertained which fundamental rights were infringed by the prohibition on political outdoor advertising, in the case of parliamentary and local government council elections, and in the case of European Parliament elections. The Supreme Court then assessed whether the prohibition on political outdoor advertising and providing for penal liability for violation thereof are in conformity with the Constitution and resolved the request of the Chancellor of Justice.

The Court agreed with the Chancellor of Justice that the prohibition on political outdoor advertising set out in the Local Government Council Election Act and the Parliament Election Act infringes the right to vote, the right to stand as a candidate in conjunction with the freedom of expression, the right to engage in enterprise, the fundamental right of ownership and the freedom of activity of political parties. Similar rights are infringed by the prohibition on political outdoor advertising during the period of active campaigning for the elections to the European Parliament.

The Court also agreed that the prohibition was established with an aim to increase voter turnout, raise the quality of democratic discussion, prevent the manipulation of voters and reduce the role of money in the achievement of political power. All these objectives are based on the idea of strengthening democracy, which is one of the key principles of the organisation of the Estonian State. Thus, the prohibition is supported by a very weighty constitutional principle.

But according to the Supreme Court *en banc*, the prohibition on political outdoor advertising does not restrict the part of the right to vote or to stand as a candidate or of the freedom of political expression or of the freedom of activity of political parties which needs the strongest protection.

The prohibition does not deprive the voters of the possibility of participating in elections or voting for their preferred candidate. It does not prevent anyone from standing as a candidate. It does not stop candidates, election coalitions or political parties from promoting their views, or stifle public debate on particular issues. It does not hinder the dissemination of political views and discussion of public life in any other manner (e.g. at election meetings, through personal contact with voters, print media, television, radio, direct mail, indoor advertising or new technologies). It only directs political discussions into other channels where there is more likelihood that they become more substantial than the slogans and pictures displayed in outdoor advertising.

As to the right to engage in enterprise and the fundamental right of ownership, in the opinion of the Court the interference is not significant.

In addition the Court noted that although the prohibition is permissible according to the Constitution, this does not mean that the Constitution requires the establishment of such prohibition. The Parliament is free to abolish the prohibition, to establish restrictions on the time, place and size of political outdoor advertising and to set a ceiling for election expenses, which would both reduce the influence of money in achieving political power and also ensure the candidates equal opportunities in the organisation of an election campaign.

As regards the elections to the European Parliament, Article 2.b of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage directly grants Member States the possibility of setting a ceiling for candidates' campaign expenses.

On these grounds, the Supreme Court *en banc* found that the provisions prohibiting political outdoor advertising and providing for penal liability for the violation thereof are not in conflict with the Constitution, and dismissed the request of the Chancellor of Justice.

III. Seven justices out of the 19 disagreed with the judgment, presenting 3 separate opinions. In the opinion of these justices, the regulation provided for in the Election Acts according to which political outdoor advertising is prohibited during the active campaigning period, constituted, in the case of elections to Parliament and local government council elections, a disproportionate interference with the electoral rights guaranteed by Articles 57, 60 and 156 of the Constitution and with the freedom of expression guaranteed by Article 45 of the Constitution. The objectives set out in the judgment do not justify interference with the electoral rights and the freedom of expression.

Besides, according to the separate opinion, in the case of elections to the European Parliament, the constitutionality of the prohibition can be assessed only on the basis of Article 45 of the Constitution which provides for freedom of expression. Articles 57 and 60 of the Constitution regulate electoral rights only upon exercise of the power of state of Estonia, but persons elected to the European Parliament from Estonia do not exercise the power of state of Estonia. Therefore, the legality of interference with electoral rights at the elections to the European Parliament must be assessed on the basis of the legislation of the European Union.

#### *Cross-references:*

- Decision 3-4-1-5-02 of 28.10.2002 of the Supreme Court *en banc*, *Bulletin* 2002/3 [EST-2002-3-007];
- Decision 3-4-1-33-05 of 20.03.2006 of the Constitutional Review Chamber.

#### *Languages:*

Estonian, English.



# France

## Constitutional Council

### Important decisions

*Identification:* FRA-2010-2-001

**a)** France / **b)** Constitutional Council / **c)** / **d)** 12.05.2010 / **e)** 2010-605 DC / **f)** Law on opening-up of competition and regulation of the on-line gambling sector / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 13.05.2010, 8897 / **h)** CODICES (French, German, English, Spanish).

*Keywords of the systematic thesaurus:*

1.3.5.2 Constitutional Justice – Jurisdiction – The subject of review – **Community law**.

2.2.1.6 Sources – Hierarchy – Hierarchy as between national and non-national sources – **Community law and domestic law**.

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health**.

*Keywords of the alphabetical index:*

Law, normativeness / Freedom of enterprise / Public order / Regulating authority / Directive, transposition / Gambling, internet.

*Headnotes:*

It is not incumbent on the Constitutional Council to consider the compatibility of a law with France's international and European commitments. Nor must it scrutinise the compatibility of a law with the Lisbon Treaty. Such supervision is a matter for the administrative and judicial courts.

The authority attaching to decisions of the Constitutional Council does not limit the competence of the administrative and judicial courts to ensure that these commitments override an incompatible

legislative provision, even where the latter has been declared constitutional.

Any court may, if it transmits a Priority Constitutionality Question, first of all, adjudicate without awaiting the decision on the Priority Constitutionality Question if the law or statute provides that it must reach a decision within a specified time or on an urgent basis, and secondly, take any immediately necessary provisional or preventive measures to suspend a possible effect of the law incompatible with France's international and European commitments.

Nor does the legislation on Priority Constitutionality Questions deprive administrative or judicial courts of the right or duty to submit a preliminary question to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union.

Compliance with the Constitutional requirement to transpose Directives cannot be adduced in the context of a Priority Constitutionality Question.

*Summary:*

The Constitutional Council pronounced on the Law on the opening-up to competition and regulation of the on-line gaming and gambling sector. It rejected all the complaints submitted by the appellants, notably those against Articles 1, 26, 47 and 48 of the Law. It declared these articles in conformity with the Constitution.

Secondly, the Council dismissed the complaints against the Law as a whole. The procedure under which the Law was adopted was not unconstitutional. There is no fundamental principle in the gaming and gambling field recognised by the laws of the Republic which prohibits this Law.

Furthermore, the Constitutional Council dismissed the specific complaints concerning four articles: Article 1 is not devoid of normative scope; Article 26 does not infringe the right to protection of health; and Articles 47 and 48 do not infringe the principle of equality in tax matters.

The complaints against the Law as a whole also included those relating to European Union Law. This gave the Constitutional Council an opportunity to recall and clarify the case-law which it issued on the occasion of its first decision after the entry into force of the Constitutional reform relating to the Priority Constitutionality Question. It confirmed its old-established case-law to the effect that it was not responsible for scrutinising the compatibility of laws

with France's international and/or European commitments. It clarified its application in the fields of Priority Constitutionality Questions:

- it is not incumbent on the Constitutional Council, when hearing cases under Article 61 or Article 61-1 of the Constitution, to consider the compatibility of a law with France's international and European commitments. Such review is a matter for the administrative and judicial courts;
- notwithstanding the mention in the Treaty/Constitution signed in Lisbon on 13 December 2007, it is not incumbent on the Constitutional Council to scrutinise the compatibility of a law with this Treaty either;
- review of the constitutional requirement to transpose Directives is exercised only under Article 61, not Article 61-1. It does not deprive the administrative and judicial courts of their power to review the compatibility of the law with the Treaty;
- in pursuance of Article 23-3 of the Order of 7 November 1958 establishing the implementing Law on the Constitutional Council, any judge may, by transmitting a Priority Constitutionality Question, firstly give an immediate ruling without awaiting the decision on the Priority Constitutionality Question, if the law or statute provides that it must rule within a specified time or on an urgent basis, and secondly, take any immediately necessary provisional or preventive measures to suspend a possible effect of the law incompatible with France's international and European commitments;
- nor do Articles 61-1 of the Constitution and Articles 23-1 et seq. of the Order of 7 December 1958 deprive administrative or judicial courts of the power or obligation to submit a preliminary question to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union.

#### Cross-references:

- Decision of the Constitutional Council no. 2009-595 DC, 03.12.2009, Implementing Law on the application of Article 61-1 of the Constitution;
- Decision of the Constitutional Council no. 74-54 DC, 15.01.1975, Law on abortion;
- Court of Cassation, 16.04.2010, no. 12.0003 ND;
- CJUE, 22.06.2010, case *A. Melki* (C-188/10) and *S. Abdeli* (C-189/10);
- Decision of the Constitutional Council no. 2004-496 DC, 10.06.2004, Law to promote confidence in the digital economy.

#### Languages:

French.



#### Identification: FRA-2010-2-002

**a)** France / **b)** Constitutional Council / **c)** / **d)** 28.05.2010 / **e)** 2010-1 QPC / **f)** Consorts L. (freezing of pensions) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.05.2010, 9728 / **h)** CODICES (French, German, English, Spanish).

#### Keywords of the systematic thesaurus:

1.4.8.4 Constitutional Justice – Procedure – Preparation of the case for trial – **Preliminary proceedings.**  
 1.6.5.5 Constitutional Justice – Effects – Temporal effect – **Postponement of temporal effect.**  
 1.6.9.1 Constitutional Justice – Effects – Consequences for other cases – **Ongoing cases.**  
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**  
 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality.**  
 5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

#### Keywords of the alphabetical index:

War veterans / Discrimination / Pension, crystallisation.

#### Headnotes:

In reply to a Priority Constitutionality Question submitted on the basis of Article 61-1 of the Constitution, it is not incumbent on the Constitutional Council to challenge a decision in which the *Conseil d'État* or the Court of Cassation ruled that a provision was, or was not, applicable to the dispute of proceedings or whether or not it constituted grounds for prosecution.

By laying down pension review conditions which differ from those set out in the Code of Civilian and Military Retirement Pensions depending on the place of residence of foreign beneficiaries of war veteran's



pensions at the time of entitlement, the challenged provisions establish differential treatment as compared with French nationals residing in the same foreign country. The legislature cannot differentiate according to the nationality of such pensioners. To that extent the legislative provisions complained of are declared inconsistent with the equality principle.

### Summary:

The Council pronounces on the constitutionality of the *crystallisation* (freezing) system for pensions charged to the State budget or the budgets of public establishments. These pensions concern nationals of countries or territories which once belonged to the French Union or Community or which used to be under French protection. *Crystallisation* consists in replacing pension entitlement with an allowance of a non-reviewable amount. The provisions in question specifically concern the special regime created for Algerian nationals.

The purpose of the allowance granted to civilian or military retirement pensioners is to guarantee, depending on their place of residence abroad at the time of entitlement, living conditions consonant with the duties discharged in the service of the State. The Council considers that by laying down review conditions which differ from those set out in the Code of Civilian and Military Retirement Pensions they establish differential treatment as compared with French nationals residing in the same foreign country. In the Council's view, such differential treatment can be justified on the basis of a differing purchasing power but not on the nationalities of pensioners residing in the same foreign country, otherwise it infringes the equality principle.

The challenged provisions were nevertheless repealed in 2006, but they removed Algerian nationals from the scope of the provisions of Article 100 of the 2007 Finance Law, which fully "de-froze" only war veterans' invalidity and retirement pensions, i.e. it excluded retirement pensions. The Council holds that this regime leads to differential treatment based on nationality among military invalidity and war veteran pensioners depending on whether they are Algerian nationals or nationals of other countries or territories benefiting from "full de-freezing". This difference is unjustified in the light of the purpose of the Law, which is to restore the equality of benefits paid to war veterans regardless of whether they hold French or another nationality, and must consequently be declared contrary to the equality principle.

The Council is pronouncing for the first time under a Priority Constitutionality Question procedure on the details of its implementation. Firstly, the Council points out that it is not competent to challenge the decision of the *Conseil d'État* or the Court of Cassation finding, in pursuance of Article 23-5 of the amended Order 7 November 1958 establishing the implementing Law on the Constitutional Council, that a provision was, or was not, applicable to the dispute or proceedings or whether or not it constituted grounds for prosecution.

Secondly, the Council modifies the effects of repealing a legislative provision under its decision of non-conformity. Consequently, in order to enable the legislature to remedy the unconstitutional aspect noted, the repeal of the aforementioned provisions will take effect at 1 January 2011. However, in order to retain the usefulness of the present decision for settling proceedings in hand at the time of the Council decision, the courts must defer their decisions in cases whose resolution depends on implementing provisions declared unconstitutional until 1 January 2011, and also the legislature must ensure the application of the new provisions to these proceedings in hand at the date of the present decision.

### Cross-references:

- State Council, 30.11.2001, *Ministre de la défense et autre v. Diop*, no. 212179.

### Languages:

French.



### Identification: FRA-2010-2-003

**a)** France / **b)** Constitutional Council / **c)** / **d)** 28.05.2010 / **e)** 2010-3 QPC / **f)** Union of Families in Europe (Family Association) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 29.05.2010, 9730 / **h)** CODICES (French, German, English, Spanish).

*Keywords of the systematic thesaurus:*5.2 Fundamental Rights – **Equality.**5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**5.3.27 Fundamental Rights – Civil and political rights – **Freedom of association.***Keywords of the alphabetical index:*

Family association.

*Headnotes:*

The power to act as the official representatives of families in their relations with the public authorities enjoyed solely by approved associations does not constitute a “monopoly” that should exclude other associations which pursue the same aim. There is no violation of the principle of equality or breach of freedom of expression or freedom of association.

*Summary:*

In Article L. 211-3.3, The Social Action and Families Code confers on the National Union of Family Associations (UNAF) and the District Unions of Family Associations (UDAFs) the power to act as the official representatives of all families before the public authorities.

The applicant, the Union of Families in Europe, maintained that this situation – which it described as an “absolute ‘monopoly’” – constituted a barrier to family interests being defended before the public authorities by associations not empowered to represent them by that law. They maintained that it constituted a breach of the principle of equality between, on the one hand, the UNAF and the UDAFs and, on the other, non-approved family associations, and also a breach of the latter associations’ freedom, of the pluralism of trends in thinking and opinions and lastly of freedom of association.

The Constitutional Council observed that the legislature can derogate from the principle of equality based on Article 6 of the Declaration of the Rights of Man and the Citizen of 1789 only where it is faced with different situations or, failing that, for reasons of general interest. In the present case, the Constitutional Council recognised the existence of two different situations in that, by virtue of the rules governing their establishment, their functioning and their composition, approved associations have a different status from general associations; it also recognised that the law pursues a general interest, since the UNAF and the UDAFs, which are composed

of associations which wish to belong to them, were set up for a purpose of public utility.

Nor did the Constitutional Council see any breach of the freedom of expression of these associations, since under the final paragraph of that article the public authorities are authorised to take the interests defended by non-approved family associations into account. In addition, as the objective of constitutional value of pluralism of trends in thinking and opinions applies only to situations relating to political life and the media, the Constitutional Council held that the complaint alleging breach of that objective was ineffective.

For the remainder, as the UNAF and the UDAFs were composed of family associations which were free to join them and to establish themselves, the Constitutional Council did not recognise any breach of freedom of association and thus did not declare that provision contrary to the Constitution.

*Cross-references:*

- Decision of the Constitutional Council no. 71-44 DC of 16.07.1971, Freedom of Association;
- State Council, 27.06.2008, no. 290750, Union of Families in Europe.

*Languages:*

French.

*Identification: FRA-2010-2-004*

**a)** France / **b)** Constitutional Council / **c)** / **d)** 11.06.2010 / **e)** 2010-2 QPC / **f)** M<sup>me</sup> Viviane L. (so-called “anti-Perruche” Law) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 12.06.2010, 10847 / **h)** CODICES (French, German, English, Spanish).

*Keywords of the systematic thesaurus:*

1.6.9.1 Constitutional Justice – Effects – Consequences for other cases – **Ongoing cases.**  
5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child.**

5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

*Keywords of the alphabetical index:*

Action for medical damages / Disability / Birth, injury.

*Headnotes:*

The responsibility principle is a constitutional requirement whose implementation the legislature may restrict for reasons of general interest, provided that such restriction of the principle does not cause a disproportionate breach of the victim's rights. The principle of full compensation for an injury has legislative value only. In the instant case, consideration of the general interest (difficulties with prenatal diagnosis and the ethical, social and financial consequences) is set off against the fact that the national community must bear the costs which will result from the child's disability, originating from a serious medical error, throughout his/her life. The restriction of the injury qualifying for compensation is not disproportionate.

The rule that a child born with a disability cannot apply for compensation where the error invoked did not cause the disability is a matter for the exclusive appraisal of the legislature, which does not infringe any constitutional requirement in adopting it.

The legislative provision which directly applies the new mechanism "to proceedings in hand at the date on which the law came into force, except for those in which a final decision has been taken on the compensation principle" is contrary to the Constitution since in the instant case there is no sufficient reason of general interest for retroactively modifying the rules applicable to proceedings in hand before a court.

*Summary:*

The Constitutional Council heard a Priority Constitutionality Question relating to the conformity with the rights and freedoms guaranteed by the Constitution of the regulations on responsibility established in Article 1.I of Law no. 2002-303 of 4 March on patients' rights and the quality of the healthcare system.

- First of all, the Council considered the first paragraph of Article L. 114-5 of the Code of Social Action and the Family, which prohibits the child from claiming damages for the sole fact of his or her birth. This means that a child born with a disability cannot

apply for compensation for the latter if the error invoked did not cause the disability. The Council held that this rule is a discretionary matter for the legislature. In the instant case, the legislature merely exercised its competence, without infringing any constitutional requirement. On the one hand, health professionals and establishments are not exempted from responsibility, and on the other, the criteria adopted by the legislature regarding children born with disabilities and the error causing the disability are directly linked to the purpose of the law; the equality principle is therefore properly observed.

- Secondly, the Council examined the third paragraph of Article L. 114-5 of the Code of Social Action and the Family. This paragraph restricts the conditions for incurring medical responsibility by making the responsibility off a medical professional or establishment vis-à-vis the parents of a child born with a disability which was not detected during the pregnancy dependent on "aggravated negligence". The Constitutional Council recalled its case-law to the effect that the principle of full compensation for an injury has only legislative value. The legislature can place restrictions justified by a reason of general interest on the principle of responsibility. In the instant case, the legislature prohibited the parents from obtaining compensation for the prejudice resulting from the costs of the disability via medical damages. Firstly, compensation for such disability is incumbent on the national community, and secondly, such a system does not exonerate medical professionals and establishments generally from their responsibility. Lastly, the legislature based their choice on ethical and social considerations, as well as on financial reasons falling within their discretionary powers.

- Thirdly, the Constitutional Council considered unconstitutional the legislative provision which directly applied the new mechanism "to proceedings in hand at the date on which the law came into force, except for those in which a final decision has been taken on the compensation principle". It found that in the instant case there was no sufficient reason of general interest to modify retroactively the rules applicable to proceedings in hand before a court.

*Cross-references:*

- State Council, 14.02.1997, *Centre hospitalier de Nice*, no. 133238;
- Court of Cassation, Plenary, 17.11.2000, no. 99-13.701, *M. Perruche*;
- Decision of the Constitutional Council no. 82-144 DC, 22.10.1982, Law on the development of staff representative institutions;
- ECHR, 06.10.2005, *Draon et Maurice v. France*, nos. 1513/03 and 11810/03.

*Languages:*

French.

*Identification:* FRA-2010-2-005

**a)** France / **b)** Constitutional Council / **c)** / **d)** 09.07.2010 / **e)** 2010-13 QPC / **f)** Mr Orient O. and others (Travellers) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 10.07.2010, 12841 / **h)** CODICES (French, English).

*Keywords of the systematic thesaurus:*

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin.**

5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement.**

5.3.10 Fundamental Rights – Civil and political rights – **Rights of domicile and establishment.**

*Keywords of the alphabetical index:*

Public order / Travellers / Parking / Eviction.

*Headnotes:*

The distinction which the legislature draws between settled persons and non-settled persons, who have chosen a nomadic lifestyle, does not establish any discrimination, since it is based on a difference in situation between the lifestyles of the persons concerned and not on ethnic origin.

The legislature which adopted measures permitting the forcible removal of mobile homes unlawfully parked in such a way as to have an adverse effect on public health, security or peace, by making those measures subject to conditions and guarantees, reconciled, in a manner which was not manifestly imbalanced, the need to protect public order and the constitutionally guaranteed freedoms, which include the freedom to come and go, a component of the personal freedom safeguarded by Articles 2 and 4 of the Declaration of the Rights of Man and the Citizen of 1789.

*Summary:*

A preliminary question of constitutionality was referred to the Constitutional Council pursuant to Article 61-1 of the Constitution concerning the compatibility with the Constitution of Sections 9 and 9-1 of Law no. 2000-614 of 5 July 2000 on the provision of campsites for travellers, resulting from Law no. 2007-297 of 5 March 2007 on the prevention of offending. These provisions establish a simplified expulsion procedure where the municipality has complied with the district campsite scheme (by providing a campsite) and allow the prefect, after serving notice, to carry out the forcible removal of vehicles illegally parked outside the authorised campsites. The provisions seek to meet two objectives: to ensure that campsites are provided for travellers but also to ensure respect for public order and the rights of third parties.

The applicants relied, first, on the principle of equality as set out in Article 1 of the Declaration of the Rights of Man and the Citizen and on Article 1 of the Constitution of 1958, since they considered that the measures, based on ethnic considerations, were discriminatory; and, second, on the constitutionally guaranteed freedoms, and in particular on the freedom to come and go based on Articles 2 and 4 of the 1789 Declaration.

The Council rejected, in the first place, the complaint that the difference between non-settled persons and settled persons is based on a difference in ethnic origin. The Council observed, in effect, that the legislature took into account the difference in situation between persons living in mobile homes, who have chosen a nomadic life, and those living in permanent homes. The legislature did not draw any distinction between persons according to criteria of ethnic origin. That distinction was therefore based on objective and rational criteria directly related to the aim which the legislature set for itself of providing campsites for travellers in conditions compatible with public order and the rights of third parties.

The Council rejected, in the second place, the plea alleging breach of the constitutionally guaranteed freedoms, and in particular the freedom to come and go, on the ground that the legislature adopted measures to reconcile, in a manner which was not manifestly imbalanced, the need to safeguard public order and those freedoms. The Law provides that forcible eviction can be carried out by the representative of the State only in the event of unlawful parking capable of adversely affecting public health, security or peace, solely at the request of the mayor or the owner or legal occupier of the land. It can take place only after the occupants have been given notice to leave and they must be given a

minimum period of twenty four hours from notification within which to leave the unlawfully occupied land voluntarily. The eviction may be challenged by an action before the court, which has suspensory effect. Consequently, regard being had to those conditions and guarantees, the legislature sufficiently delimited the eviction mechanism.

The Council found that the contested provisions were not contrary to any other right or freedom guaranteed by the Constitution.

*Languages:*

French.



## Germany

### Federal Constitutional Court

#### Important decisions

*Identification:* GER-2010-2-006

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 07.07.2009 / **e)** 1 BvR 1164/07 / **f)** Occupational pension, same-sex marriage, survivors' pensions / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 124, 199 / **h)** *Der Betrieb* 2009, 2441; *Versicherungsrecht* 2009, 1607; *Zeitschrift für das gesamte Familienrecht* 2009, 1977; *Deutsches Verwaltungsblatt* 2009, 1510; *Zeitschrift für Tarifrecht* 2009, 642; *Juristenzeitung* 2010, 37; *Streit* 2009, 170; *Entscheidungssammlung zum Arbeitsrecht* Richtlinie 2000/78 EG-Vertrag 1999 no. 13; *Entscheidungssammlung zum Tarifrecht im öffentlichen Dienst* 100 § 25 TVöD-AT no. 12; *Neue Juristische Wochenschrift* 2010, 1439; *Familie Partnerschaft Recht* 2010, 240; CODICES (German, English).

*Keywords of the systematic thesaurus:*

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation**.

5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status**.

*Keywords of the alphabetical index:*

Civil partnership, registered / Marriage, civil partnership, unequal treatment / Survivor's pension / Occupational pensions.

*Headnotes:*

The unequal treatment of marriage and registered civil partnerships with regard to survivors' pensions under an occupational pension scheme for civil service employees who have supplementary pensions insurance with the Supplementary Pensions Agency for Federal and Länder Employees (*Versorgungsanstalt des Bundes und der Länder – VBL*) is incompatible with Article 3.1 of the Basic Law.

If the privileged treatment of marriage is accompanied by unfavourable treatment of other ways of life, even where these are comparable to marriage with regard to the life situation provided for and the objectives pursued by the legislation, the mere reference to the requirement of protecting marriage under Article 6.1 of the Basic Law does not justify such a differentiation.

### Summary:

I. The Supplementary Pensions Agency for Federal and Länder Employees (hereinafter, "VBL") is a supplementary pensions institution under public law for civil service employees. It grants the employees affected, under private law, an old-age pension, benefits on the reduction of earning capacity and a survivor's pension. This supplements a pension under the statutory pension scheme. The VBL Rules are deemed general conditions of insurance under private law. Unlike the statutory pension scheme, the VBL supplementary pension scheme does not pay a survivor's pension for registered civil partners.

In the Federal Republic of Germany, the legal institution of registered (same-sex) civil partnerships was created in 2001. With effect from 1 January 2005, the legal institution was brought closer to matrimonial law. Among other things, matrimonial property law was adopted, the law of maintenance was harmonised, the pension rights adjustment was introduced and the civil partners were integrated in the provisions for survivors in statutory pensions insurance.

The applicant unsuccessfully challenged the unequal treatment of marriage and registered civil partnerships with regard to survivors' pensions under the occupational pension scheme according to the VBL Rules before the civil courts up to the Federal Court of Justice (*Bundesgerichtshof*). He thereupon lodged a constitutional complaint challenging the civil courts' decisions.

II. The Federal Constitutional Court decided that the challenged court decisions violate the applicant's fundamental right to equal treatment under Article 3.1 of the Basic Law. The last-instance decision of the Federal Court of Justice was overturned in this respect, and the matter was referred back to it.

1. The general principle of equality demands that all people be treated equally before the law. It is also prohibited to grant, in a manner that violates the principle of equality, favourable treatment to a group of persons while denying it to another. Irrespective of their private-law nature, the VBL Rules (hereinafter, the "Rules") are to be measured directly against the

precept of equality because as a public-law institution, the VBL performs a public-sector task.

2. The provisions on survivors' pensions in § 38 of the Rules result in unequal treatment of insured persons who are married and insured persons who live in a registered civil partnership. An insured person who is married has, as part of his or her own position under a supplementary pension, an expectancy to the effect that if he or she dies, his or her spouse will receive a survivor's pension. Registered civil partners do not acquire such an expectancy.

3. This unequal treatment of marriages and registered civil partnerships is not constitutionally justified.

a. The unequal treatment of married persons and registered civil partners under § 38 VBL Rules requires a strict standard for reviewing whether a sufficiently weighty reason for differentiation exists. There is a special need for justification. This is because the unequal treatment of spouses and registered civil partners relates to the personal characteristic of sexual orientation, and the provision concerning survivors' pensions in the Rules largely follows the provision of statutory insurance concerning widows' and widowers' pensions. This link, however, is abandoned to the disadvantage of registered civil partnerships. If a legislator incorporates in a set of rules a consistent set of provisions taken from another set of rules, and in doing so deviates from it with regard to an individual provision, it is particularly likely that there is a violation of the general principle of equality.

b. A mere reference to marriage and its protection is not sufficient to justify the unequal treatment. Viable objective reasons for unequal treatment in the area of occupational survivors' pensions do not exist. In particular they do not result from an inequality of the life situations of married couples and civil partners. Article 6.1 of the Basic Law places marriage and family under the special protection of the state. In order to fulfil the requirements of the mandate of protection, it is, in particular, the duty of the state to refrain from everything that damages or otherwise adversely affects marriage, and to promote marriage by suitable measures. The legislator is in principle not prevented from treating it more favourably than other ways of life. The provisions that treat marriage more favourably with regard to maintenance and pensions and in tax law may find their justification in the spouses' joint shaping of their lives and in the responsibility for the partner which is assumed in the long term and which is also legally binding.

If marriage is given privileged treatment while other ways of life are disadvantaged which are comparable to marriage with regard to the life situation provided for and the objectives pursued by the legislation, the mere reference to the requirement of protecting marriage does not justify such a differentiation.

For the authority to give favourable treatment to marriage over other ways of life in fulfilment and further refining of the constitutional mandate to promote marriage does not give rise to a requirement contained in Article 6.1 of the Basic Law to disadvantage other ways of life in comparison to marriage. It cannot be constitutionally justified to derive from the special protection of marriage a rule that other partnerships are to be structured in a way different from marriage and to be given lesser rights. Beyond the mere reference to Article 6.1 of the Basic Law, a sufficiently weighty factual reason is required here which, measured against the given subject and objective of regulation, justifies the unfavourable treatment of other ways of life.

c. No differences under non-constitutional law or factual differences can be identified which justify treating registered civil partners less favourably than spouses with regard to the VBL survivors' pension.

The VBL survivors' pension is a benefit from an occupational pension scheme and as such forms part of the remuneration. As regards the objective of granting remuneration, no differences can be identified between married employees and employees who live in a civil partnership. The same applies with regard to the nature of provision for old age of benefits from occupational old-age pensions. The legislation concerning the obligations to provide maintenance within marriages and registered civil partnerships has been almost identical since 1 January 2005. Thus, the same standards apply when measuring the maintenance requirement of a person entitled to maintenance and the maintenance gap arising upon the death of a person liable for maintenance.

No reason for differentiating between marriage and registered civil partnerships can be found in the fact that married couples typically have a different pension requirement than civil partners because of gaps in their working lives due to their raising children. Not every marriage has children. Nor is every marriage oriented towards having children. Nor can it be assumed either that the role allocation in marriages is such that one of the two spouses is considerably less occupation-oriented. The image of the "breadwinner marriage", in which one of the spouses maintains the other, which is no longer a correct categorisation of social reality, cannot be regarded as the yardstick for assigning survivors' benefits.

On the other hand, in registered civil partnerships too it is certainly possible that the roles will be allocated in such a way that one partner is more strongly oriented towards his or her occupation and the other partner more strongly towards the domestic sphere, including childcare. Children live in a large number of registered civil partnerships. The proportion of children living in registered civil partnerships is far lower than that living with married couples, but it is by no means negligible.

In addition, any periods of bringing up children or another individual need of provision independent of marital status may be taken into account more concretely.

4. Where general conditions of insurance – as in this case the VBL Rules – infringe Article 3.1 of the Basic Law, this results, according to the case-law of the civil courts, which is constitutionally unobjectionable, in the clauses concerned being invalid. Gaps in the conditions which arise from this can be filled by way of a supplementary interpretation. The violation of the principle of equality cannot be removed by the mere failure to apply § 38 of the Rules, because this would exclude survivors' pensions for spouses too. The drafting intention pursued in the survivor's pension scheme under § 38 of the Rules can thus only be completed in such a way that the provision for spouses will, with effect from 1 January 2005, also apply to registered civil partners.

#### *Languages:*

German, English (on the website of the Federal Constitutional Court).



#### *Identification: GER-2010-2-007*

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 14.04.2010 / **e)** 1 BvL 8/08 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 126, 29 / **h)** *Europäische Grundrechte-Zeitschrift* 2010, 336; CODICES (German).

*Keywords of the systematic thesaurus:*

5.2.1.2.2 Fundamental Rights – Equality – Scope of application – Employment – **In public law.**

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender.**

*Keywords of the alphabetical index:*

Privatisation, equal treatment, employees / Right to return to civil service.

*Headnotes:*

Decision regarding the equal treatment of employee groups upon the privatisation of the clinics of the Free and Hanseatic City of Hamburg. [Official Headnotes]

In the present case, the unequal treatment of different employee groups upon privatisation as regards their right to return to civil service infringes the general principle of equality under Article 3.1 of the Basic Law.

*Summary:*

I. In 1995 the *Betrieb Landeskrankenhäuser Hamburg* (hereinafter, “LBK Hamburg”), a public law institution with legal capacity, was established. This was done under the responsibility of the Free and Hanseatic City of Hamburg. The employment relationships of the employees who had worked until then in the city-owned hospitals were transferred to LBK Hamburg. All employees in the city clinics were granted the right to return to the civil service in the event of privatisation.

As of 1 January 2000, LBK Hamburg assigned its wholly-owned subsidiary C. GmbH to provide the cleaning services in the hospitals. The employment relationships of the workers in the cleaning services were transferred to C. GmbH by way of a partial transfer of business in accordance with § 613a of the Civil Code.

At the beginning of 2005 the *Betriebsanstalt LBK Hamburg* was established and converted into a limited liability company, LBK Hamburg GmbH. Based on legislation, this company became the employer of a significant portion of the employees already transferred in 1995 from the City to LBK Hamburg, however, this did not include those workers in the cleaning services still employed by C. GmbH. Initially, the City remained the majority shareholder of LBK Hamburg GmbH.

In § 17 sentence 1 of the Law on the Hamburg Pension Fund – Public Law Institution (*Gesetz über den Hamburgischen Versorgungsfonds – Anstalt öffentlichen Rechts*, hereinafter, the Act) from 21 November 2006, the right to return to the civil service granted to employees in the event of a sale of the majority was now limited to employees of LBK Hamburg GmbH. On 1 January 2007, the majority of the shares in LBK Hamburg GmbH were transferred from the City to a private entity.

The plaintiff in the original proceedings was employed in 1987 as a cleaner at the *Allgemeines Krankenhaus Altona*. In 1995 her employment relationship was transferred from the City to LBK Hamburg and from 2000 onward she was an employee of C. GmbH. She sued the City for a declaration that she had the right to return to the civil service. The Higher Labour Court (*Landesarbeitsgericht*) submitted the question of whether § 17 of the Act is compatible with the Basic Law to the Federal Constitutional Court through the procedure of a concrete review of a statute.

II. The First Panel of the Federal Constitutional Court has decided that § 17 sentence 1 of the Act is incompatible with both Article 3.1 of the Basic Law (general principle of equality) as well as with Article 3.2 of the Basic Law (equal treatment of men and women). The state legislator has until 31 December 2010 to enact a new law.

In essence, the decision is based on the following considerations.

§ 17 sentence 1 of the Act leads to unequal treatment within the group of employees whose employment relationships were transferred from the City to LBK Hamburg in 1995. Originally the cleaning staff were granted the right to return to the civil service in the event of privatisation, as were the other employees of the city clinics upon the establishment of LBK Hamburg. However, this right was repudiated by § 17 sentence 1 of the Act because it was limited to the employees of LBK Hamburg GmbH.

This unequal treatment is not justified and therefore incompatible with Article 3.1 of the Basic Law. That the cleaning staff were employed by a company organised under private law prior to the privatisation is not a justifiable reason for discriminating against the cleaning staff. Nothing different applies to the employees who fulfil the legislative prerequisites for the right to return to the City. From the beginning of 2005 onward their employer likewise was a limited liability company.



The City of Hamburg argues that the cleaning staff could have maintained their civil service status at the time of their transfer on 1 January 2000, by stating their objection to the change of employer pursuant to § 613a.6 of the Civil Code. This argument, however, does not present any relevant legal difference to the other employees. The cleaning staff cannot be presumed to have consciously decided in 2000 to not remain in the civil service. Rather, they merely tolerated without objection the partial transfer of business from LBK Hamburg to C. GmbH, which then was still controlled by the City. In this way they complied with the City's restructuring measures in the hospital area and, thus, even demonstrated their solidarity with the City's personnel planning. Moreover, at the point in time that LBK Hamburg was no longer their employer, the legal situation was identical for both employee groups. The other employees also could have maintained their employment relationship with the City by stating their objection upon the conversion of LBK Hamburg to a limited liability company. There also is no relevant legal difference in the fact that in January 2000 the cleaning staff would have had significant cause for objection to the change of employer while, however, the other employees did not at the turn of the year 2004/2005. This is because subsequent to the partial transfer of business, the cleaning staff only had an actual, permanent employment opportunity with C. GmbH. Thus, one cannot say that the cleaning staff would have had an alternative that would not have caused them an appreciable legal or economic risk.

The discrimination against the cleaning staff also cannot persuasively be supported by the fact that the cleaning of buildings is not a service that can be directly allocated to health care. The City privatised all areas of the hospitals and did not see a necessity for leaving individual areas in the public sector. Thus, it is not persuasive that only certain employee groups are permitted to demand continued employment in the civil service.

Furthermore, the rule in § 17 sentence 1 of the Act is incompatible with Article 3.2 of the Basic Law because it leads to gender discrimination. By limiting the right to return, the state legislator disadvantaged female employees disproportionately and without justifiable legal grounds. The gender-specific effect of the special rule for cleaning staff comes from the fact that it primarily impacts on women, in the amount of 93.5 %. This percentage is significantly higher than the percentage of women in the clinic area, which is already high.

#### *Languages:*

German.



#### *Identification:* GER-2010-2-008

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 08.06.2010 / **e)** 1 BvR 2011/07, 2959/07 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 126, 112 / **h)** *Deutsches Verwaltungsblatt* 2010, 1035; CODICES (German).

#### *Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law.**  
5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**

#### *Keywords of the alphabetical index:*

Rescue services, system change / Rescue services, private companies / Occupation or profession, access, prerequisites, objective.

#### *Headnotes:*

1. As an encroachment upon occupational freedom, the incorporation of private rescue companies into the public rescue service is at any rate justified if, according to an assessment by the legislator that is not obviously erroneous, improvements can be expected of it regarding the protection of the citizenry, economic efficiency in the provision of the services, and transparency and equality of opportunities in the selection procedure of the service providers.

2. Even in regard of objective prerequisites of access to an occupation or profession, which in general are only justified to avert demonstrable or highly probable serious dangers to a public welfare interest of paramount importance, constitutional-court review must take into account the legislator's discretion in evaluation with a view to the danger situation and the degree of probability of the occurrence of damage.

#### *Summary:*

I. There are currently ground-based rescue services encompassing ambulances and emergency rescue services in all *Bundesländer* (states) under public authority (public rescue services). The implementation of the public rescue services occasionally is incumbent upon the fire department. In most *Länder*, however,

such responsibility is transferred to private relief organisations and private companies. The legal structures for the transfers vary widely. In some cases only a public rescue service is provided for within which private service providers can participate (uniform or incorporation model); in other *Länder* private rescue services are permitted in addition to the public services (dual system or separation model).

In the Free State of Saxony, in addition to the public rescue service there was also originally a private one. The public authority responsible for the rescue service transferred the implementation of emergency rescue and ambulance services to private relief organisations or other companies by way of a contract under public law. In addition to this, companies with approval to provide emergency or ambulance services could also operate a private rescue service in their own name, under their own responsibility, and on their own account. Approval was to be denied if it was expected that by using their service the public interest in a fully-functioning rescue service would be impaired.

The change from a dual system to an incorporation model for the rescue service was carried out through the Saxon Act on Fire Prevention, Rescue Services, and Disaster Control (*Sächsisches Gesetz über den Brandschutz, Rettungsdienst und Katastrophenschutz*). Pursuant thereto, the participation of private rescue companies is only possible within the framework of the public rescue services. The public authority of the rescue services transfers the implementation of emergency rescue and ambulance services by a contract under public law after conducting a selection procedure. It establishes uniform compensation for the emergency services with the entity bearing the costs or sets the fees by regulation. It is further incumbent upon the public authority responsible for the rescue services to establish command centres. These usually are cross-organisational facilities that arrange for deployment of and steer the rescue services, notify the fire departments and support their deployment operations, and notify disaster control units.

The primary goal of the new law is to guarantee efficient protection of the citizenry from fires, accidents, public emergencies, and disasters by uniformity in organisation and implementation in all areas.

The two applicants, who operate private rescue companies in Saxony, lodged constitutional complaints against this reorganisation.

II. The First Panel of the Federal Constitutional Court in part dismissed the constitutional complaints as inadmissible, and otherwise rejected them.

In essence, the decision is based on the following considerations.

One of the constitutional complaints is inadmissible to the extent that it complains of the structuring of the selection procedure provided for in the new law – for it is reasonable to expect the affected applicant to take legal action before the non-constitutional courts in the event there is a negative decision for the applicant in the selection procedure.

Both constitutional complaints are otherwise unfounded. The change in the system to exclusively public rescue service does affect the occupational freedom (the freedom to choose and exercise an occupation) of the applicants. For participation in the public rescue services not only requires the conclusion of a contract under public law with the authority responsible for the rescue services, an interested party also must have prevailed against its competitors in a selection procedure. Such a selection procedure, however, only takes place when and to the extent there is a need for ambulances and emergency doctor vehicles. Moreover, private companies can no longer provide their rescue services on the basis of their own contractual agreements with the entities bearing the costs of the rescue services and the health insurance companies.

These encroachments upon the applicants' occupational freedom, however, are justified. In reorganising the rescue services the legislator pursued legitimate goals for the public welfare and also was entitled to assume that within the framework of its discretion in evaluation and prognosis the rules complained of are suitable and necessary to achieve these objectives.

The improvement of the protection of the citizenry's life and health pursued by the reorganisation concerns public welfare needs of paramount importance, which would be placed in serious jeopardy without the encroachment upon occupational freedom. Through the incorporation of private companies into the public rescue services, their admittance is now dependent upon the need for ambulances and emergency doctor vehicles. This avoids overcapacity. In turn, overcapacity, in light of high investment and maintenance costs gives rise to the fear that a competitive struggle among private rescue companies would arise, which would severely interfere with the functionality of the rescue services.

In addition, the legislator was entitled to assume that the complete transfer of the rescue services to public responsibility will contribute to general standardisation of the protection concept among fire departments, rescue services, and disaster control and is both suitable and necessary for contributing to

the efficient implementation of emergency rescue and ambulance services. The incorporation allows consolidation of public authority responsibilities and power. It thus guarantees improved coordination of deployments of the fire department, rescue services, and disaster control, as well as access to all necessary resources. Further, the framework of an exclusively publicly organised rescue service also opens the possibility of flexible and uniform planning of command centres and rescue stations, which do not need to take into account existing approvals for private companies. Thus, comprehensive and professional provision of rescue services for the citizenry while avoiding unnecessary duplication can more easily be ensured. Particularly in cases of larger cross-organisational deployments or major damage sites, the most comprehensive and quickest possible centralised coordination of all available rescue equipment and personnel is obviously beneficial. The protection of functionality clause previously regulated in the dual system, whereby the admittance of private companies was only allowed where the functionality of the public rescue services would not be impaired or endangered, is not similarly efficient for improving the functionality of the public rescue services. This is because it neither contributes to standardisation of the structures and procedures of fire departments, rescue services, and disaster control services, nor to more efficient coordination of rescue service deployments.

The encroachment upon the complainants' occupational freedom is also justified in regard to economic efficiency. The legislator was entitled to assume that the complete incorporation of private providers into the public rescue services will exclude or at least reduce costly duplications of personnel and rescue equipment by improved planning ability and efficiency in the coordination of deployments. Thus, the number of command centres is reduced and the remaining centres can operate more cost-effectively. The potential for savings also rises through improved networking among the rescue services with fire departments and disaster control services. The organisational consolidation of emergency rescue and ambulance services in the public rescue services likewise contributes to the economic efficiency of the entire system. In contrast to public authorities, private companies are not obliged to also offer their services in unprofitable regions. In order to minimise their costs public rescue services therefore are dependent upon the contributions that ambulance services, which tend to be profitable, provide toward balancing out the expenses for the provision of comprehensive rescue services and, in particular here, expenses for emergency rescue.

Finally, the system change is suitable and necessary to also achieve the targeted goal of a transparent procedure for admittance that provides equality of opportunities. In practice, the former legal situation led to a closed system of established providers. In the public rescue services contracts with relief organisations, and in the private rescue services company approvals, were regularly extended. In contrast to this, abandoning the separation between public and private rescue services now for the first time has opened competition among relief organisations and private companies for all necessary capacities under the same conditions. All, particularly new bidders, in principle have the same chance to be selected as service providers.

Within the framework of evaluating all relevant circumstances, it must be recognised that through the restructuring the private companies' access to work in the Saxony rescue services is not per se prevented. They have the possibility that they previously had to operate professionally as a provider in the rescue and ambulance services. Those remaining encroachments on their occupational freedom do not appear unreasonable in light of the overriding public welfare objectives of the efficient protection of the life and health of the citizenry.

The restructuring of the rescue service also cannot be objected to under constitutional law based upon the protection of legitimate expectations. The holders of approvals for the implementation of emergency rescue and ambulance services are granted a four-year transition period during which they can continue to operate their companies under the former legal framework. After the expiry of the transition period, it is reasonable to expect the applicants to bid together with all other interested parties for the conclusion of a contract in a selection procedure that is transparent and provides equality of opportunities. They have no claim for permanent maintenance of their occupational activities in the rescue services. If the intention of the law as it is here is in contrast to unchanged occupational activity, the protection of legitimate expectations does not require that the affected parties receive this possibility to the former extent.

#### *Languages:*

German.



*Identification:* GER-2010-2-009

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 29.06.2010 / **e)** 1 BvR 1745/06 / **f)** / **g)** / **h)** *Europäische Grundrechte-Zeitschrift* 2010, 353; *GesundheitsRecht* 2010, 443; CODICES (German).

*Keywords of the systematic thesaurus:*

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

5.3.31 Fundamental Rights – Civil and political rights – **Right to respect for one's honour and reputation.**

*Keywords of the alphabetical index:*

Pregnancy, termination, protest / Anti-abortionist, protests, civil-court order to cease and desist / Right of personality, general, encroachment.

*Headnotes:*

A civil-court order for an anti-abortionist to cease and desist from protests, in particular by addressing patients of an “abortion doctor” in the immediate vicinity of the doctor’s surgery, violates the freedom of expression guaranteed by sentence 1 of Article 5.1 of the Basic Law.

*Summary:*

I. The applicant regards abortions as reprehensible by reason of his religious convictions. He regularly organises protests against gynaecologists who terminate pregnancies. For this purpose, he stands in the street near the doctor’s practice in question and draws attention to his opinion on the subject of abortion with posters and leaflets. He also addresses passers-by, in particular, those who he considers may be patients of the gynaecologist. He then attempts to persuade them to rethink their opinions on the subject of abortion.

In the present case, the applicant positioned himself in front of a gynaecologist’s practice on two days. The gynaecologist, according to the findings of the courts, terminated pregnancies as part of his medical practice at that time and also referred to this on the internet. The applicant distributed leaflets which stated that the doctor carried out “unlawful abortions ... which, however, are permitted by the German legislator and are not criminal offences”. The applicant also named the gynaecologist as an

abortion doctor on the internet, on a website the applicant operated. The doctor then instituted civil proceedings against the applicant for an order to cease and desist.

The Regional Court (*Landgericht*) found in favour of the plaintiff, the doctor. It ordered the applicant to cease and desist from:

- referring in public to the fact that the plaintiff, identifiable by name or otherwise, terminated pregnancies or that pregnancies were terminated in his practice; and
- addressing patients of the plaintiff or passers-by within a radius of one kilometre from the plaintiff’s current surgery and referring expressly or impliedly to abortions carried out in the practice.

The Court found that the applicant’s demonstrations were an unlawful encroachment on the plaintiff’s general right of personality, with the result that the plaintiff was entitled to the order to cease and desist under §§ 823.1, 1004 of the German Civil Code which he sought. The Higher Regional Court (*Oberlandesgericht*) dismissed the applicant’s appeal against this.

II. The First Chamber of the First Panel of the Federal Constitutional Court accepted the constitutional complaint for decision, set aside the decisions of the civil courts and referred the matter back to the Regional Court.

In essence, the decision is based on the following considerations.

The statements which the applicant was prohibited from making are true statements of fact. They do not touch the plaintiff’s particularly protected sphere of intimacy, nor his privacy, but merely state events from his social sphere. Such utterances must in principle be accepted. As a general rule, they only cross the threshold of violation of the right of personality if they give rise to a fear of damage to personality which is out of proportion to the interest in the dissemination of the truth. But the decisions challenged do not display such a serious interference with the plaintiff’s general right of personality in a manner that is constitutionally sound. In particular, they do not show that the doctor is threatened by a comprehensive loss of social respect if his willingness to undertake terminations of pregnancy is made the subject of a public discussion. An argument against this is that he was accused not of a criminal offence or other unlawful activity, but merely of an activity that is morally reprehensible in the opinion of the applicant. In addition, the doctor himself referred to this activity in public.

Moreover, the courts also failed to take sufficient consideration of the fact that the applicant, in referring to terminations of pregnancy, raised a topic of considerable public interest. This increases the weight of his interest in making the statements, which must be weighed against the doctor's rights.

The courts also referred to the effects of the statements in question on the doctor-patient relationship. But these considerations do not support the challenged decisions in constitutional law either. However, the consideration that the patients, who pass the place where the applicant is standing in order to reach the doctor's practice, feel as if they were running the gauntlet as a result of his campaign, is an important aspect. Article 5.1 of the Basic Law does protect the expression of opinions, but not activities which are intended – by coercive means – to force others to hold an opinion. It cannot therefore be ruled out that in the individual case a constitutionally sound prohibition of particular forms of protest could be based on this aspect and on the associated interference with the confidential relationship between doctor and patient, which enjoys particular legal protection. In any event, however, this does not justify a prohibition as broad as the one in the present case.

Possible harassments of patients which touch on the doctor's fundamental right of occupational freedom (Article 12.1 of the Basic Law) cannot be invoked to support the prohibition of referring to terminations of pregnancy within a radius of one kilometre from the practice where they are carried out – irrespective of whether the place is one which the patients have to pass – and even less so to support the prohibition of referring to this in public in another manner.

#### Languages:

German.



**Identification:** GER-2010-2-010

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 06.07.2010 / **e)** 2 BvR 2661/09 / **f)** Honeywell decision / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 126, 286 / **h)** CODICES (German, English).

#### Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law.**

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

5.4.8 Fundamental Rights – Economic, social and cultural rights – **Freedom of contract.**

#### Keywords of the alphabetical index:

Damage incurred relying on legitimate expectations / European Union act, *ultra vires* / Court of Justice of the European Union, submission procedure, preliminary ruling / Obligation to submit, preliminary ruling, Court of Justice of the European Union / Employment contract, fixed term / Act, *ultra vires*, European Union, Federal Constitutional Court review / Law, inapplicability, retroactive, compensation.

#### Headnotes:

1.a. *Ultra vires* review by the Federal Constitutional Court can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to a structurally significant shift to the detriment of the Member States in the structure of competences.

1.b. Prior to the acceptance of an *ultra vires* act, the Court of Justice of the European Union is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU, insofar as it has not yet clarified the questions which have arisen.

2. To ensure the constitutional protection of legitimate expectations, it should be considered, in constellations of retroactive inapplicability of a law as a result of a ruling by the Court of Justice of the European Union, to grant compensation domestically for a party concerned having trusted in the statutory provision and having made plans based on this trust.

3. Not all violations of the obligation under Union law to make a submission constitute a breach of sentence 2 of Article 101.1 of the Basic Law. The Federal Constitutional Court only complains of the interpretation and application of rules on competences if, on a sensible evaluation of the concepts underlying the

Basic Law, they no longer appear to be comprehensible and are manifestly untenable. This standard for what is considered arbitrary is also applied if a violation of Article 267.3 TFEU is considered to have taken place (confirmation of Decisions of the Federal Constitutional Court <*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE> 82, 159 <194>).

### Summary:

I. The applicant is an enterprise involved in automotive supplies. In February 2003, it concluded several fixed-term employment contracts with previously unemployed individuals. There were no objective reasons for the fixed term of employment. Objective reasons were in principle required. However, according to the version of sentence 4 of § 14.3 of the Law on Part-Time Working and Fixed-Term Contracts (*Teilzeit- und Befristungsgesetz*, hereinafter, the Law) which was applicable at that time, it was possible to depart from this principle if the employee had already reached the age of 52 on commencement of the employment relationship.

The plaintiff of the original proceedings had been employed by the complainant on this basis. He later asserted a claim *vis-à-vis* the applicant with regard to the invalidity of the fixed-term nature of the employment contract. His request for a finding that the employment relationship was to continue and for continued employment was successful before the Federal Labour Court (*Bundesarbeitsgericht*).

The Federal Labour Court found that the employment relationship between the parties had not ended as a result of its fixed-term nature. It further stated that national courts could not apply sentence 4 of § 14.3 of the Law for they were bound in this respect by the judgment of the European Court of Justice of 22 November 2005 in Case C-144/04. A provision of national law such as sentence 4 of § 14.3 of the Law was said to be incompatible with Anti-Discrimination Directive 2000/78/EC and the general principle of non-discrimination in respect of age according to this judgment. Since the judgment of the European Court of Justice was absolutely clear, there was no need for a renewed submission. Although the agreement on a fixed term of employment which was the subject of the dispute was reached prior to the *Mangold* judgment, the Federal Labour Court refused to apply sentence 4 of § 14.3 of the Law for reasons of the protection of legitimate expectations under Community or national law.

The applicant considers its contractual freedom and its right to its lawful judge to have been violated by the judgment of the Federal Labour Court.

II. The Second Panel of the Federal Constitutional Court rejected the constitutional complaint as unfounded. In essence, the decision is based on the following considerations.

1. A violation of the applicant's contractual freedom does not result from the fact that the impugned judgment of the Federal Labour Court is based on a non-permissible further development of the law on the part of the European Court of Justice, and that the *Mangold* judgment should therefore not have been applied in Germany as a so-called *ultra vires* act.

As the Panel found in its Lisbon judgment, *ultra vires* review of acts of the European bodies and institutions by the Federal Constitutional Court may only be exercised in a manner which is considerate (well-disposed) towards European law. It can hence only be considered if a breach of competence on the part of the European bodies and institutions is sufficiently qualified. This is contingent on the acts of the authority of the European Union being manifestly in breach of competences. Furthermore, the impugned act must lead to a structurally significant shift to the detriment of the Member States in the structure of competences between Member States and the European Union.

When reviewing acts of the European bodies and institutions, the Federal Constitutional Court must in principle adhere to the rulings of the European Court of Justice as providing a binding interpretation of Union law. Insofar as the European Court of Justice has not yet clarified the questions which have arisen, it should therefore be afforded the opportunity to interpret the Treaties prior to the acceptance of an *ultra vires* act, as well as to rule on the validity and interpretation of the acts in question.

Measured against this, the Federal Labour Court has not ignored the scope of the applicant's contractual freedom. At any rate, the European Court of Justice has not violated its competences by virtue of the outcome in the *Mangold* judgment in a sufficiently qualified manner.

This particularly applies to the derivation of a general principle of non-discrimination in respect of age. It is irrelevant whether such a principle could be derived from the constitutional traditions common to the Member States and their international agreements. Even a putative further development of the law on the part of the European Court of Justice that would no longer be justifiable in terms of legal method would only constitute a sufficiently qualified infringement of its competences if it also had the effect of establishing competences in practice. The derivation of a general principle of non-discrimination in respect of age would

however not introduce a new competence for the European Union, nor would an existing competence be expanded. Anti-Discrimination Directive 2000/78/EC had already made non-discrimination in respect of age binding for legal relationships based on employment contracts, and hence opened up discretion for interpretation for the European Court of Justice.

2. The applicant's contractual freedom has also not been violated because the impugned judgment of the Federal Labour Court did not grant any protection of legitimate expectations.

Confidence in the continuation of a law can be affected not only by the retroactive finding of its invalidity by the Federal Constitutional Court, but also by the retroactive finding of its inapplicability by the European Court of Justice. The possibilities for Member States' courts to grant protection of legitimate expectations are however pre-defined and limited by Union law. Accordingly, the Member States' courts cannot grant protection of legitimate expectations by virtue of applying a national provision – whose incompatibility with Union law has been established – for the time prior to the issuing of the preliminary ruling.

The case-law of the European Court of Justice, by contrast, does not provide any indication that Member States' courts are precluded from granting secondary protection of legitimate expectations by compensation. To ensure constitutional protection of legitimate expectations, one must hence consider – in constellations of retroactive inapplicability of a law as a result of a ruling of the European Court of Justice – granting compensation domestically for a party concerned having trusted in the statutory regulation and having made plans based on this trust.

Measured by this, the Federal Labour Court has not ignored the scope of protection of legitimate expectations that is to be constitutionally granted. Because of the primacy of application of Community and Union law, it was allowed to not consider itself able to grant protection of legitimate expectations by confirming the rulings of the previous instances that had been handed down in favour of the applicant. A claim for compensation against the Federal Republic of Germany for the loss of assets which the applicant suffered by virtue of the employment relationship being extended for an indefinite period of time was not the subject-matter of the proceedings before the Federal Labour Court.

3. The applicant was, finally, not denied its lawful judge by virtue of the Federal Labour Court not submitting the case to the European Court of Justice.

The Federal Labour Court justifiably presumed in this respect that it was not obliged to effect such a submission.

The Federal Constitutional Court confirms its case-law in this context, in accordance with which the standard of arbitrariness which it generally applies when interpreting and applying competence norms also applies to the obligation to make a reference in accordance with Article 267.3 TFEU (see its decision of 31 May 1990). The Federal Constitutional Court is not obliged by Union law to fully review the violation of the obligation to submit under Union law and to orientate it in line with the case-law that has been handed down by the European Court of Justice on this matter.

The ruling was handed down with 6:2 votes with regard to the grounds and with 7:1 votes with regard to the outcome.

III. Justice Landau has added a dissenting opinion to the ruling. He takes the view that the Panel majority is taking the requirements too far as to the finding of an *ultra vires* act by the Community and Union bodies by the Federal Constitutional Court. The European Court of Justice is said to have manifestly transgressed the competences granted to it to interpret Community law with the *Mangold* judgment. Under these circumstances, it is said that the Federal Labour Court was prevented from invoking the *Mangold* judgment, setting aside sentence 4 of § 14.3 of the Law and granting the action against the employment relationship being extended for an indefinite period of time.

#### Cross-references:

- Decisions 2 BvL 12, 13/88, 2 BvR 1436/87 of 31.05.1990, *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 82, 159 (in particular p. 194);
- Decisions 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 2 BvR 182/09 of 30.06.2009, *Bulletin* 2009/2 [GER-2009-2-009];
- Decision C-144/04 (*Mangold*) of the European Court of Justice of 22.11.2005, *Bulletin* 2007/3 [ECJ-2007-3-006].

#### Languages:

German, English (on the website of the Federal Constitutional Court).



*Identification:* GER-2010-2-011

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 21.07.2010 / **e)** 1 BvR 420/09 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 127, 132 / **h)** *Zeitschrift für das gesamte Familienrecht* 2010, 1403; CODICES (German, English).

*Keywords of the systematic thesaurus:*

5.3.33 Fundamental Rights – Civil and political rights  
– **Right to family life.**

5.3.44 Fundamental Rights – Civil and political rights  
– **Rights of the child.**

*Keywords of the alphabetical index:*

Child born out of wedlock / Father, child born out of wedlock, parental custody / Child, best interests / Parental custody, child born out of wedlock.

*Headnotes:*

The parental right under Article 6.2 of the Basic Law of the father of a child born out of wedlock is violated because he is in principle excluded from the parental custody of his child where the child's mother does not consent and because he cannot obtain a judicial review as to whether, for reasons of the child's best interests, it is appropriate to grant him the parental custody of his child together with the mother or to transfer the sole parental custody of the child to him in place of the mother.

*Summary:*

I. In 1998, the Act Reforming the Law of Parent and Child (*Gesetz zur Reform des Kindschaftsrechts*) entered into effect. For the first time, it gave parents who are not married to each other the opportunity, through § 1626a of the Civil Code (hereinafter, the "Code"), to have joint parental custody of their children, regardless of whether or not they live together. The requirement for this is that this is their intention and both parents make declarations of parental custody to this effect (§ 1626a.1.1 of the Code). Failing this, the mother retains sole parental custody of a child born out of wedlock. A transfer of sole parental custody from the mother to the father where the parents permanently live apart may also, under § 1672.1 of the Code, only be effected with the consent of the mother. The father of a child born out of wedlock may be given parental custody against her will only if parental custody is removed from the mother on grounds of endangering the child's best

interests, if her parental custody is permanently suspended or if she dies.

As early as 2003, the Federal Constitutional Court dealt with the compatibility of § 1626a.1.1 of the Code with a father's parental right under Article 6.2 of the Basic Law (*Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 107, 150 *et seq.*, see cross-reference below). In doing so, it stated that an incompatibility would be shown to exist if it transpired – contrary to the assumption of the legislator – that there were a large number of cases where, for reasons not based on the child's best interests, the parents of children born out of wedlock did not have joint custody. The legislator was instructed to review the legislation in this respect. In its decision of 3 December 2009, the European Court of Human Rights held that the general exclusion of judicial review of the initial attribution of sole custody to the mother was disproportionate with regard to the aim pursued, that is, the protection of the best interests of a child born out of wedlock (see cross-reference below).

The applicant is the father of a son who was born out of wedlock in 1998. The parents separated when the mother was pregnant. Their son has lived in the mother's household since he was born. He has, however, regular contact with his father, who has acknowledged his paternity. The mother refused to make a declaration of joint parental custody. When the mother planned to move with the child, the applicant applied to the Family Court for the mother to be partially deprived of parental custody and for the right to determine the child's place of abode to be transferred to himself. In the alternative, he applied for sole parental custody to be transferred to himself or for the court to give consent to joint custody in place of the mother. The Family Court dismissed the applications, applying the current law. The appeal against this to the Higher Regional Court (*Oberlandesgericht*) was unsuccessful.

II. In response to the constitutional complaint, the First Panel of the Federal Constitutional Court has decided that §§ 1626a.1.1 and 1672.1 of the Code are incompatible with Article 6.2 of the Basic Law. The order of the Family Court is set aside and the case is referred back for a new decision. Until revised legislation enters into force, the Federal Constitutional Court, supplementing the above-mentioned provisions, has provisionally ordered as follows: the Family Court, on the application of a parent, is to transfer parental custody or part thereof to the parents jointly, provided it is to be expected that this complies with the child's best interests. On the application of a parent, parental custody or part thereof is to be transferred to the father alone where



joint parental custody is out of the question and it is to be expected that this best complies with the child's best interests.

It is constitutionally unobjectionable that the legislator initially transfers parental custody of a child born out of wedlock to its mother alone. It is also compatible with the Constitution that the father of a child born out of wedlock is not granted joint parental custody together with the mother at the same time as his paternity is effectively recognised. Such an arrangement would certainly be compatible with the Constitution if it were combined with the possibility of obtaining judicial review as to whether joint parental custody in accordance with statute actually satisfies the child's best interests in the individual case. It is, however, not constitutionally required.

With the arrangement currently in effect, however, the legislator disproportionately encroaches upon the parental rights of the father of a child born out of wedlock. The provision of § 1626.1.1 of the Code, which provides that sharing joint parental custody is subject to the mother's consent, constitutes a far-reaching encroachment upon the father's parental rights under Article 6.2 of the Basic Law if there is no possibility of judicial review. The legislator disproportionately generally subordinates the father's parental rights to those of the mother although this is not necessary in order to protect the child's best interests.

The assumption of the legislator on which the current law is based has proved to be incorrect. The legislator had assumed that parents generally make use of the possibility of joint parental custody. It had further assumed that mothers' refusal of consent is as a rule based on a conflict between the parents which has detrimental effects for the child and is based on reasons which do not serve the mother's own interests but preserve the interests of the child. On the contrary, only slightly more than half of the parents of children born out of wedlock agree to make declarations of joint parental custody. In addition, on the basis of empirical studies, it may be assumed that a considerable number of mothers refuse consent to joint parental custody merely because they do not want to share their traditional parental custody with the child's father.

The provision of § 1672.1 of the Code which makes the transfer of sole parental custody of a child born out of wedlock subject to the mother's consent is also a serious and unjustified encroachment upon the father's parental rights under Article 6.2 of the Basic Law. Conversely, however, enabling a court transfer of sole parental custody to the father is a serious encroachment on the parental rights of the mother if in the individual case the father's application is granted, for the parental custody previously exercised

by the mother is completely removed from her. Moreover, this is done not because she has failed in her duty of upbringing and therefore the child's best interests are endangered, but because the father, in competition with her, claims his parental right. In addition, as a rule a change of parental custody entails the child moving from the mother's household to the father's household. This particularly affects the child's need for stability and continuity. Taking this into account and weighing the constitutionally protected interests of both parents against each other, it is admittedly not compatible with Article 6.2 of the Basic Law to refuse the father sole parental custody. However, transferring sole parental custody from the mother to the father of the child born out of wedlock is justified only if there is no other possibility of safeguarding the father's parental rights which encroaches less seriously upon the mother's parental rights. Moreover, important reasons of the child's best interests must suggest removing parental custody from the mother. It must therefore first be examined whether joint parental custody of both parents may be considered as a less drastic arrangement. Where this is the case, there must be no transfer of sole custody.

#### Cross-references:

- Decision 1 BvL 20/99, 1 BvR 933/01 of 29.01.2003, *Bulletin* 2009/3 [GER-2009-3-023];
- European Court of Human Rights, Application no. 22028/04, 03.12.2009, *Zaunegger v. Germany*.

#### Languages:

German, English (on the website of the Federal Constitutional Court).



#### Identification: GER-2010-2-012

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 21.07.2010 / **e)** 1 BvR 611/07, 1 BvR 2464/07 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest) 126, 400 / **h)** *Deutsches Steuerrecht* 2010, 1721; *Finanz-Rundschau* 2010, 851; *Neue Juristische Wochenschrift* 2010, 2783; *Zeitschrift für Erbrecht und Vermögensnachfolge* 2010, 482; CODICES (German, English).

*Keywords of the systematic thesaurus:*

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens.**

5.2.2.11 Fundamental Rights – Equality – Criteria of distinction – **Sexual orientation.**

5.2.2.12 Fundamental Rights – Equality – Criteria of distinction – **Civil status.**

5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

*Keywords of the alphabetical index:*

Civil partnership, registered / Marriage, civil partnership, treatment, unequal / Tax law, inheritance tax, gift tax.

*Headnotes:*

The unequal treatment of marriage and registered civil partnerships in the version of the Gift and Inheritance Tax Act (*Erbschaftsteuer- und Schenkungsteuergesetz*) applicable until 31 December 2008 is incompatible with Article 3.1 of the Basic Law.

*Summary:*

I. In the Federal Republic of Germany, the legal institution of registered (same-sex) civil partnerships was created in 2001. Pursuant to the provisions in §§ 15, 16, 17 and 19 of the Gift and Inheritance Tax Act in the version dated 20 December 1996 from the 1997 Annual Tax Reform Act (hereinafter, “the Act”), registered civil partners were significantly more burdened than spouses under inheritance tax.

Pursuant to §§ 15.1 and 19.1 of the Act, spouses were subject to the most beneficial Tax Class I and, depending upon the amount of the inheritance, were subject to a tax rate between 7 and 30 %. Civil partners, however, were classified as “other recipients” and placed in Tax Class III, which provides for tax rates of between 17 and 50 %. Moreover, § 16.1.1 of the Act granted spouses a personal exemption in the amount of DM 600,000 / € 307,000. § 17.1 of the Act granted a special exemption for retirement benefits in the amount of DM 500,000 / € 256,000. On the other hand, registered civil partners were only entitled to an exemption in the amount of DM 10,000 / € 5,200 (§ 16.1.5, § 15.1 of the Act). They were completely excluded from the benefit of the tax exemption for retirement benefits.

In the Inheritance Tax Reform Act (*Erbschaftsteuerreformgesetz*) of 24 December 2008, the above-mentioned provisions in the Gift and Inheritance Tax Act were amended to the benefit of

registered civil partners. Now the personal exemption and the exemption for retirement benefits are determined in the same way for both inheriting civil partners and spouses. Nevertheless, registered civil partners continue to be treated like distant relatives and unrelated persons and taxed at the highest tax rates. Pursuant to the Federal Government’s draft legislation for the 2010 Annual Tax Reform Act of 22 June 2010, complete equality for civil partners and spouses in the gift and inheritance tax law – also in regard to tax rates – is intended.

Applicant no. 1 is the sole heir of his male civil partner who passed away in August 2001; Applicant no. 2 is the heir of her female civil partner who passed away in February 2002. In both cases the tax office set the inheritance tax in accordance with a tax rate from Tax Class III and granted the minimum exemption provided by the Act. The lawsuits filed by the applicants against these decisions were unsuccessful in the Finance Court (*Finanzgericht*) and in the Federal Finance Court (*Bundesfinanzhof*). The applicants thereupon lodged a constitutional complaint challenging the decision of the Federal Finance Court and indirectly the above-mentioned provisions of the Act.

II. As to their constitutional complaints, the First Panel of the Federal Constitutional Court decided that the inheritance tax law discrimination against registered civil partners in comparison to spouses regarding the personal exemption and the tax rate, as well as their exclusion from the exemption for retirement benefits, is incompatible with the general principle of equality (Article 3.1 of the Basic Law). The orders by the Federal Finance Court were set aside and the matters were referred back to it for new decisions. The legislator has until 31 December 2010 to enact a new rule for the old cases affected by the Act. This rule is to remove the infringement on equality from the time period between the creation of the legal institution of the registered civil partnership until the effective date of the Inheritance Tax Reform Act of 24 December 2008.

In essence, the decision is based on the following considerations.

As to discriminating against registered civil partners in comparison to spouses, there is no difference that is of such weight that it could be justified. This applies to the personal exemption, to the exemption for retirement benefits, and to the amount of the tax rate.

Granting a privilege to spouses and not to civil partners regarding the personal exemption cannot be justified solely by reference to the state’s special protection of marriage and the family (Article 6.1 of

the Basic Law). If the privileged treatment of marriage is accompanied by unfavourable treatment of other ways of life, even where these are comparable to marriage with regard to the life situation provided for and the objectives pursued by the legislation, the mere reference to the requirement of protecting marriage under Article 6.1 of the Basic Law does not justify such a differentiation. The authority of the state to become active for marriage and the family in fulfilment of its duty of protection as set forth in Article 6.1 of the Basic Law thus remains completely unaffected by the question of the extent to which others can assert claims for equal treatment. Only the principle of equality (Article 3.1 of the Basic Law), in accordance with the principles of application developed by the Federal Constitutional Court on this, determines whether and to what extent others, in this case registered civil partners, have a claim for treatment equal to the statutory or actual promotion of married spouses and family members.

The different rule on exemptions is not justified by greater financial strength of inheriting civil partners. To the extent the basis for the higher exemption for spouses and children is claimed to be that because of their special close relationship and their economic relationship to the testator they are financially weaker after the death than would be expected given the nominal value of the inheritance, the considerations at the basis of this are equally applicable to registered civil partners. Like spouses, they live in a permanent, legally bound partnership. During the life of their registered civil partner they share that person's assets and expect to be able to maintain their joint standard of living in the event of the death of a civil partner. To the extent maintenance of the inheritance is aided by the exemption for spouses, which acts to replace financial support and acts as a pension, this also applies to civil partners, who pursuant to the legal situation at the start of the proceedings, were already obligated towards one another for "reasonable support".

Likewise, the principle of the family characterising inheritance tax law cannot justify discrimination of registered civil partners in comparison to spouses in regard to the personal exemption. As with marriage, a registered civil partnership is intended to be permanent, is a legal bond, and is the basis for mutual support and the obligation to assume liabilities. Unequal treatment also is not legitimised by the fact that in principle joint children can only result from a marriage and that the legislator, relying on the principle of family, sought to maintain small and medium-sized assets as undiminished as possible from generation to generation. In its qualification as a starting point for a succession of generations, marriage basically differs from civil partnerships

because same-sex couples cannot have a joint child. However, this fact cannot be used as the basis for different treatment of spouses and civil partners because it is not sufficiently implemented in the statutory rule. This is because the applicable law – in contrast to earlier laws – did not make the privilege extended to marriage or the amount of the exemption for spouses dependent upon the existence of joint children.

Furthermore, there is also no sufficient basis for differentiation concerning the complete disregard of civil partners in relation to the exemption for retirement benefits. The exemption for retirement benefits serves primarily to equalise the different inheritance tax law treatment of statutory and contractual retirement amounts and to compensate insufficient retirement support for the remaining spouse with tax-free retirement benefits. This legislative goal is valid in the same way for civil partners.

Finally, there are no sufficient grounds for differentiation enabling registered civil partners on one hand to be placed into Tax Class III with the highest tax rates and spouses on the other hand to be placed into Tax Class I with the lowest tax rates. As with the personal exemption, the differences between marriage and civil partnerships under the current legislative concept do not support discrimination against civil partners in the allocation of tax classes.

#### *Languages:*

German, English (on the website of the Federal Constitutional Court).



# Hungary

## Constitutional Court

---

### Important decisions

*Identification:* HUN-2010-2-006

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 14.07.2010 / **e)** 142/2010 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2010/119 / **h)**.

*Keywords of the systematic thesaurus:*

3.10 General Principles – **Certainty of the law.**

*Keywords of the alphabetical index:*

Subsidy, agriculture / European Union.

*Headnotes:*

The Law on the Introduction and Operation of the Single Payment Scheme to Agriculture has a disadvantageous effect on agricultural growers who entered the market after 2006 or acquired new cultivation areas.

*Summary:*

I. On October 2008, the Hungarian Parliament adopted the Law on the Introduction and Operation of the Single Payment Scheme (hereinafter, the “SPS”) for Agriculture.

In November 2008, the President of the Republic asked the Constitutional Court to review the legislation introducing the SPS. In the President’s opinion, the reference point based around which subsidies would be paid would put farmers who started working their land at a later date at a disadvantage. The President did not regard the whole of the SPS as unconstitutional, and drew particular attention to the fact that the basic concept of the SPS for agriculture derives from EU Law, although the creation of a legal rule for such content does not stem from EU obligations, but rather from the free decisions of Parliament.

The Law on the Introduction and Operation of the SPS transforms the right to the utilisation of Community assistance for agricultural land into an independent property interest. The persons entitled to assistance under the legislation are those who were the users of agricultural land under any title and who requested a subsidy in 2006.

In the President’s opinion, the introduction of 2006 as the point of reference contravened the requirement of legal certainty deriving from Article 2.1 of the Constitution.

II. The Constitutional Court held that the Law introducing the SPS infringes the principle of legal certainty. Legal certainty demands that land owners be able to form a clear view of the consequences when they lease their lands, enabling them to conclude the appropriate contracts. The Law does not comply with this requirement; none of its provisions offer protection of the interests of agricultural growers who entered the market after 2006. Under the Hungarian SPS model, the total national ceiling would comprise the so-called regional component (a flat-rate component of payment entitlements based on land use in the first year of SPS), the complementary national reserve (allocated on a historic basis, reference amounts of 2006) and the classical national reserve. However, the proportions of these are determined not by the Law itself, but by the minister in charge. The Constitutional Court found that the Law did not take into account the legitimate interests of those agricultural growers who entered the market after 2006.

Justice András Holló attached a dissenting opinion, in which he was joined by justices András Bragyova and Miklós Lévy. He pointed out that the constitutional requirement of legal certainty also comprises the principle of the protection of reliance and limits the intervention of the legislator in the formation of existing long-lasting legal relations. The Court emphasised in each of its decisions relating to that matter, that a constitutional border can be drawn between the freedom of activity of the legislator on the one hand and the interests of the addressees in the permanence or in change with adequate time for preparation. Both require protection and consideration must be given to the circumstances of each current case. The Court in its case-law only declared unconstitutionality when the principle of the protection of reliance had been breached and the legal regulation had caused damage. In the current case, the possibility of additional burdens for some agricultural growers was the sole basis for annulment. In Justice Holló’s view, it was not sufficient to declare unconstitutional the relevant provision of the Law on introducing the SPS.

Justice László Kiss also attached a dissenting opinion, in which he was joined by Justice Miklós Lévy. Justice Kiss suggested that the Constitutional Court should have requested clarification from the European Court of Justice on a point of interpretation of Community law, specifically to determine whether the national law complied with it. The Constitutional Court did not do that, stating instead that the historical representative period could only refer to a given period in the past. He did not, therefore, feel able to agree with its finding of unconstitutionality.

#### Languages:

Hungarian.



#### Identification: HUN-2010-2-007

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 14.07.2010 / **e)** 143/2010 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2010/119 / **h)**.

#### Keywords of the systematic thesaurus:

3.1 General Principles – **Sovereignty**.

3.9 General Principles – **Rule of law**.

#### Keywords of the alphabetical index:

Treaty, European Communities / Enactment / Constitutional review.

#### Headnotes:

The reforms brought about by the Lisbon Treaty are of paramount importance, but do not change the fact that Hungary retains its independence, and its status with respect to the rule of law.

#### Summary:

I. Several private individuals asked the Constitutional Court to assess the compliance with the Constitution of the Act of Promulgation of the Lisbon Treaty (Act CLXVIII of 2007). They suggested that the new rules and mechanisms of the Lisbon Treaty jeopardised the existence of the Republic of Hungary as an independent, sovereign State, governed by the rule of law.

II. The Constitutional Court pointed out that the reasoning and the examples set out in the petition are similar to those examined by other European constitutional courts in the framework of the *a priori* constitutional review of the Lisbon Treaty, done at the request of national governments and members of parliament. The Constitutional Court carefully examined these *dicta* and the scholarly opinions criticising some of them.

Under Article 36.1 of the Act on the Constitutional Court, before ratifying an international treaty, the President of the Republic and the Government may request the examination of the constitutionality of an international treaty or of its provisions thought to be of concern.

However, this institution of *a priori* constitutional review of international treaties was not applied in 2007 to the Act of promulgation of the Lisbon Treaty.

The Constitutional Court examined its competence concerning the Act of promulgation and concluded that even if the Treaty of Lisbon modifying the Treaty on European Union and the Treaty establishing the European Community (the latter renamed as the Treaty on the Functioning of the European Union) entered into force, this did not mean that a different type of review was needed for the Act of promulgation by comparison with the review of ordinary acts and other legal norms which might be challenged under the *actio popularis* system, guaranteed by the Act on the Constitutional Court.

The Constitutional Court pointed out that in the framework of the *a posteriori* review of norms, due attention should be paid to the fact that Hungary is a member state of the European Union. Therefore, even if a decision was passed declaring unconstitutionality, this would not jeopardise the execution of all the commitments deriving from membership of the European Union. In such a case, the legislator should find a solution whereby EU commitments could be executed without violating the Constitution.

The Constitutional Court also emphasised that, in the case of treaties of such high importance, the competent authorities should always request, in due time, *a priori* constitutional review. The deliberation of the present petition is closely linked to the fact that such a review was not requested.

The Constitutional Court recognised that proper interpretation of the EU treaties and other EU-norms falls under the competence of the European Court of Justice.

The Constitutional Court used the theory of *acte clair* and did not need to refer the case to the European Court of Justice, because it was evident that the petitioner's arguments (and challenge of the constitutionality of the Act of promulgation) were a result of imperfect and inadequate reading and understanding of the Lisbon Treaty. The full verbatim quotation of Article 49/A (currently Article 50) of the Treaty on the European Union revealed that, contrary to the petitioner's allegation, no state could be obliged to uphold its membership if it does not want to do so.

Following the philosophy of the *acte clair*, the Constitutional Court considered that in order to refute the petitioner's arguments, it was enough to refer to changes of rules on the European Union following the Lisbon Treaty, which can be regarded as facts of common knowledge, such as the attribution of a legally binding nature to the Charter of Fundamental Rights, and the enlargement of the role and competences of national parliaments according to Protocol no. 2 on subsidiarity and proportionality. These demonstrate that the petitioner's arguments as to alleged dangers of the Lisbon Treaty are unfounded.

The Constitutional Court also interpreted the relevant articles of the Constitution on sovereignty, democracy, rule of law and European co-operation. According to the Court, the so-called European clause (Article 2/A of the Constitution) cannot be interpreted in a way that would deprive the clauses on sovereignty and rule of law of their substance.

The Constitutional Court emphasised that material and procedural rules were duly observed during the adoption of the Act of Promulgation and the Parliament gave its consent to the content of the Lisbon Treaty of its own free will.

In summary, the Constitutional Court concluded that, although the reforms of the Lisbon Treaty were of paramount importance, they did not alter the fact that Hungary maintains and enjoys her independence, her status in terms of rule of law and her sovereignty.

Consequently, the application was rejected in its entirety.

Concurring and dissenting opinions were attached to the decision.

Chief Justice Péter Paczolay emphasised in his concurring opinion, that the Lisbon Treaty, after its entry into force, is no longer part of the Act of Promulgation. Therefore the Court could not review the constitutionality of the Lisbon Treaty itself. Justice Miklós Lévay joined him in this concurring opinion.

Justice László Trócsányi also attached a concurring opinion to the judgment. He stressed that the principle of independence and the rule of law enshrined in Article 2 of the Constitution should always be in harmony with the "European" clause of the Constitution (Article 2/A).

Justice András Bragyova attached a dissenting opinion to the decision. In his view, the Constitutional Court should not have decided the current case on the merits. The petitioner had not only asked for a review of the constitutionality of the Lisbon Treaty, but also of all the international treaties on the basis of which the European Union operates.

The Constitutional Court does not have the competence to review the Act of Promulgation of the Lisbon Treaty. After its entry into force, the Lisbon Treaty as an international treaty is no longer in effect; its provisions now form part of the founding treaties.

#### *Languages:*

Hungarian.



# Israel

## Supreme Court

---

### Important decisions

*Identification:* ISR-2010-2-003

**a)** Israel / **b)** High Court of Justice (Supreme Court) / **c)** Extended Panel / **d)** 14.06.2010 / **e)** HCJ 4124/00 / **f)** Yekutieli v. The Minister of Religious Affairs / **g)** / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.21 General Principles – **Equality**.  
 4.10.2 Institutions – Public finances – **Budget**.  
 5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.

*Keywords of the alphabetical index:*

Discrimination / Student.

*Headnotes:*

Budgetary Section 20-38-21 of the Annual Budget Law, which establishes the payment of income support stipend to Yeshiva students studying at a “Kollel” (students enrolled in an advanced Judaic studies programme intended for married people), infringes the principle of equality in a disproportionate manner and stands in contradiction to a multitude of High Court rulings to the effect that state relief must be distributed on an equal basis.

*Summary:*

I. “Kollel students” are entitled to income support payments on the basis of Budgetary Section 20-38-21 of the Annual Budget Law. In contrast to Kollel students, due to the provisions of the Income Support Law of 1980 (hereinafter, the “Income Support Law”), students at institutes of higher education, Yeshiva students, students at religious institutions, and students at institutions for the training of priests are not entitled to the above allowances. In the circumstances, the applicants claimed that the budgetary provision under consideration is discriminatory and accordingly illegal and unconstitutional.

II. The majority of the panel (led by the President of the Court – Justice D. Beinisch) held that the underlying purpose of Section 20-38-21 is an economic one (the provision of financial relief to Kollel students), although this support may also encourage religious studies. The Court held that, given the economic purpose, there is no justification for distinguishing between “Kollel students” and students at other institutions. The Court based its conclusion, *inter alia*, on the fact that the Income Support Law and the regulations legislated on the basis of this Law explicitly prohibit payment of income support to students at institutions of higher education, Yeshiva students, students at religious institutions, and students at institutions for the training of priests. The Court stated that “Kollel students”, as per their definition, are also included in this group. On this basis and because the legislator had chosen to include Kollel students in a group with all the other students who were not entitled to receive income support, the High Court ruled that the budgetary provision under consideration circumvents the provisions of the Income Support Law and constitutes a type of “distinct funding”, which was prohibited when Section 3a of the Foundations of the Budget Law of 1985 came into force. Under Section 3a, the provision of financial assistance to public institutions from the state budget must follow the tests pertaining to the principle of equality. The principle of equality which is enshrined in Section 3a, the Court ruled, also applies to relief granted to individuals.

The High Court extensively analysed the relationship between the Foundations of the Budget Law and the Annual Budget Law, noting the normative hierarchy that exists between these laws. The Court held that the Foundations of the Budget Law, by its nature and character, constitutes a “framework law” for future budgetary laws and establishes the essential foundations for each annual budget law. Therefore, in view of the unique nature of the Annual Budget Law as an authorisation to the government to act, it was held that a provision of the Annual Budget Law which contradicts a material provision of the Foundations of the Budget Law cannot stand. Nonetheless, the Court reiterated its earlier rulings, holding that judicial review of the Annual Budget Law is, by its nature, minimal and restrained.

Alongside its ruling that the budgetary provision under consideration may not be included within future budget laws, the Court noted that the legislator may support a group within the population which has distinct characteristics, either by granting direct support or by way of indirect support. Such support must, however, be lawful and constitutional. The legislator must consider, *inter alia*, the comprehensive arrangement established in the Income Support Law,

which applies to all eligible persons in the State of Israel, and in which the legislator has expressed the aspiration to promote groups within the population who have special needs.

III. Justice A. Proccaccia, who joined the majority opinion, added that the issue of differentiation between “Kollel students” and students at other institutions in relation to income support payments exemplifies a broader dilemma between the duty of a multi-cultural society to respect the distinct nature of different sectors and the basic principle which obliges all citizens to submit to the regime’s fundamental values and to shoulder the burden of certain universal responsibilities and duties. According to Justice Procaccia, a social policy which supports a specific sector, not in order to promote its path towards full equality but in order to release its members from a common social responsibility, erodes the common denominator that links the various sectors of society. Justice Procaccia added that the budgetary provision which facilitates the payment of income support to “Kollel students” bypasses the general policy laid down by the Income Support Law *vis-à-vis* all students, in a discriminatory manner which is not rooted in any relevant difference.

Justice E. Levy, who wrote the minority opinion, determined that studying the Torah (the Hebrew name for Jewish Law) is a religious commandment which the Knesset (the Israeli legislative body) as well as the government perceived to be worthy of funding by way of imposing on the public the duty to provide students of the Torah with a livelihood. Justice Levy also indicated that the distinction between students and “Kollel students” is based on relevant differences, and even if he had reached the conclusion that the budgetary provision under consideration infringes the principle of equality, he would consider this infringement to be proportionate.

#### Languages:

Hebrew, English (translation by the Court).



## Italy Constitutional Court

### Important decisions

*Identification:* ITA-2010-2-001

**a)** Italy / **b)** Constitutional Court / **c)** / **d)** 26.05.2010 / **e)** 187/2010 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie* (Official Gazette), 03.06.2010 / **h)** CODICES (Italian).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

3.16 General Principles – **Proportionality.**

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security.**

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality.**

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

*Keywords of the alphabetical index:*

Permit, residence / Pension, disability.

*Headnotes:*

Disability allowance (*assegno di invalidità*) is a subjective right and the fact that it is conditional on applicants having a residence permit, which would require them to have been present in Italy for five years, discriminates against foreign nationals and therefore constitutes a violation of Article 14 ECHR and Article 1 Protocol 1 ECHR, as interpreted by the European Court of Human Rights. Violation of Article 14 ECHR automatically entails violation of Article 117.1 of the Constitution, which, given the principles affirmed by the Court in Judgments nos. 348 and 349 of 2007, requires legislation to comply with international obligations.



### Summary:

I. The Turin Court of Appeal raised the question of the constitutionality of Article 80.19 of Law no. 388 of 23 December 2000, making the granting of financial assistance to foreign nationals conditional on their holding a residence permit and, consequently, preventing those who, although lawfully present in Italy, do not have such a permit from obtaining welfare assistance in the form of a monthly disability allowance. The Court held that disability allowance was a subjective right and that the fact that it was conditional on applicants having a residence permit, which would require them to have been present in Italy for five years, was discriminatory against foreign nationals, and therefore constituted a violation of Article 14 ECHR and Article 1 Protocol 1 ECHR, as interpreted by the European Court of Human Rights. Violation of Article 14 ECHR automatically entails violation of Article 117.1 of the Constitution, which, given the principles affirmed by the Court in Judgments nos. 348 and 349 of 2007, requires legislation to comply with international obligations. It held that the question of constitutionality was founded.

II. Under the case-law of the European Court of Human Rights, the Convention does not oblige member states to ensure a fixed level of social welfare benefits, as they enjoy a wide margin of appreciation in this regard. Notwithstanding the fact that such measures have been incorporated into member states' legal systems, their conformity with the Convention, and in particular Article 14, which prohibits discrimination, is open to scrutiny. Any unjustifiable or unreasonable treatment is discriminatory if there is not a relationship of proportionality between the means employed and the aim pursued.

The European Court declared that it would have great difficulty in considering compatible with the Convention a difference of treatment based exclusively on nationality (*Si Amer v. France*, judgment of 29 October 2009).

The legislation that was referred to the Constitutional Court restricted the possibility for nationals of third countries to gain access to welfare benefits to which only nationals were entitled. It stipulated that "social allowances and economic measures, which are subjective rights under social services legislation, are granted, under the conditions established by law, to foreign nationals holding residence permits" (now an EC residence permit for long-term residents). The fact that the residence permit was only issued to non EC nationals lawfully residing in Italy for at least five years, meant that the disputed law had a direct

impact on the requisite conditions for obtaining welfare benefits by non EC nationals, leading to a difference in treatment between the foreign nationals and European citizens lawfully residing in Italy. The Constitutional Court held that legislation could establish conditions governing non EC nationals' access to and presence on national territory; it could stipulate that supportive measures would be granted only if the person had been resident in the territory for a reasonably long time but once entitlement to residence was acquired, it was unacceptable to discriminate against non-EC nationals by limiting their enjoyment of the fundamental rights secured to European citizens (Judgment no. 306 of 2008, see *Bulletin 2008/2*).

The Court had regard to the type of social measure concerned: disability allowance is undeniably designed to meet people's basic needs; it is therefore a fundamental right as it is aimed at ensuring the survival of the individuals to whom it is granted. The Strasbourg Court has acknowledged that in modern states, a number of individuals rely on social security benefits for their means of livelihood and that these states provide for the regular payment of allowances to them (see admissibility decision of 6 July 2005, *Stec and others v. the United Kingdom*).

In the case of a national measure relating to means of livelihood, any discrimination between nationals and foreign nationals lawfully residing on the national territory based on other than subjective reasons is in breach of Article 14 ECHR, as interpreted on several occasions by the Strasbourg Court.

The Court therefore declared unconstitutional the part of Article 80.19 of Law no. 388 of 23 December 2000, which makes the granting of disability allowance to foreign nationals lawfully resident in Italy conditional on their holding a residence permit.

### Cross-references:

- See Decision no. 306 of 2008 (*Bulletin 2008/2* [ITA-2008-2-002]).

### Languages:

Italian.



# Latvia

## Constitutional Court

### Important decisions

*Identification:* LAT-2010-2-001

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 18.01.2010 / **e)** 2009-11-01 / **f)** On Compliance of the second sentence of Paragraph 7 of the Transitional Provisions of the Law on Judicial Power (wording of 14 November 2008) with Articles 1, 83 and 107 of the Constitution of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), no. 10(4202), 20.01.2010 / **h)** CODICES (Latvian, English).

*Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers.**

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

4.7.4.6 Institutions – Judicial bodies – Organisation – **Budget.**

4.10.1 Institutions – Public finances – **Principles.**

4.10.2 Institutions – Public finances – **Budget.**

5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**

*Keywords of the alphabetical index:*

Judiciary, independence / Resource, financial, adequate / Remuneration, judge / Security, financial, judge / Difficulties, crisis, financial / Social guarantee, judge / Solidarity, principle / Pension, judge / Salary, judge.

*Headnotes:*

The Constitution and the law do not grant the Constitutional Court the right to refuse to examine the compliance of a law or another legal provision with the Constitution – even in cases where decisions affect the judiciary.

The requirement to ensure the appropriate remuneration of judges is linked not only to the principle of the independence of judges, but also to the qualification and competence requirements set for and the restrictions imposed on judges.

The principle of the separation of powers prohibits the executive power from deciding on issues, which directly influence the actions of judiciary and the functioning of courts, including issues of funding.

The prohibition on decreasing judges' remuneration during the term in office does not mean that any actions by the legislator which might have a negative impact on judges' remuneration are absolutely prohibited. However, the provisions of a law passed by the legislator which decrease the remuneration of judges are not in compliance with the Constitution because the legislator violated the principle of the separation of powers by not taking into consideration the opinion of the judiciary and not assessing the risks and negative consequences caused by those provisions.

*Summary:*

I. The applicants – more than one hundred judges of Latvia – claimed that the impugned provisions breached the principle of legal certainty, the principle of legal stability and the principle of the independence of the judiciary.

II. Neither the Constitution nor the law grant the Constitutional Court the right to refuse to examine the compliance of a law or another legal provision with the Constitution and they do not give rights to another body to prohibit the Court from fulfilling its functions or to restrict the Court in the fulfilment of its functions – even in cases where decisions affect the judiciary.

The independence of courts and judges is not an end in itself, but only a means for ensuring and strengthening democracy and the rule of law, as well as a mandatory pre-condition for realising the rights to a fair trial. The independence of judges guarantees the safeguarding of the rule of law in the interests of the society and the state. The state has the obligation to fix remuneration for judges that would be commensurate with the status, functions and responsibility of judges. The state, by envisaging appropriate funding, guarantees the effective legal protection of a person in a competent and an independent court.

The requirement to ensure the appropriate remuneration of judges is linked not only to the principle of the independence of judges, but also to the qualification and competence requirements set for and the restrictions imposed on judges. The restrictions imposed on judges concerning holding another job and receiving another income place an obligation on the state to fix sufficient remuneration and social guarantees which correspond to the status of judges. The legislator has envisaged judges'

remuneration not only in the form of salaries, but also in the form of social and security guarantees, etc. Thus, the prohibition on decreasing judges' remuneration applies not only to judges' salaries.

The principle of the separation of powers prohibits the executive power from deciding on issues which directly influence the actions of judiciary and the functioning of courts, i.e., the issues of funding, the number of judges, the necessary staff, its competence requirements, remuneration and other issues.

The legislator has the right to develop a new system of judges' remuneration, if it has a legitimate purpose, as well as serious reasons and, thus, reasonable grounds for developing a new system. Since in a democratic state the system of judges' remuneration must function in the long-term, the development of a new system in a period of crisis or under the influence of a crisis – thus, a temporary situation – at a time when a system which complies with the Constitution and the international requirements is already functional, would not comply with the principle of the independence of courts and judges.

The prohibition on decreasing judges' remuneration during the term in office does not mean that any actions by the legislator which might have a negative impact on judges' remuneration are absolutely prohibited. A temporary decrease of judges' remuneration is admissible in the presence of serious, socially justifiable reasons and if it is carried out in compliance with the principles enshrined in the Constitution.

The legislator, prior to taking decisions on the functioning of courts – both on issues linked to the budget, as well as other issues related to the realisation of the functions of the courts – , must give a possibility to the judiciary or an independent institution representing the judiciary, if established, to express its opinion on issues affecting the functioning of courts. If the legislator, for objective reasons, cannot agree with the opinion of the judiciary, the legislator has to justify its decision.

The Court notes that the restrictions to the judges' financial security – the reduction of the remuneration of judges due to the lack of resources during the economic recession – have been established by a law passed by the legislator and have a legitimate objective.

In assessing whether the legislator has infringed the independence of judges with its action, the Constitutional Court has considered all conditions concerning the specific situation. In assessing the proportionality of the restriction, the Constitutional Court has considered both the cause of the restriction,

i.e., the legitimate aim, and the way in which the restriction was imposed, as well as the possible consequences of the restriction. The legislator has not shown that it tried to fix the decrease in judges' remuneration as fairly as possible, complying with all principles following from the Constitution.

The Constitutional Court concludes that the principle of the separation of powers was violated when the impugned provisions were adopted. The legislator did not take into consideration the opinion of the judiciary. The legislator did not assess the risks and negative consequences caused by the impugned provisions.

The Constitutional Court also concludes that the principle of solidarity has not been observed.

Consequently, the Constitutional Court declares that the impugned provisions are not in compliance with the Constitution. The Court takes into account, however, that an immediate enforcement of the judgment could cause negative consequences for the State budget. Even more negative consequences would occur if these provisions were declared void as from the date of coming into force. Therefore, having assessed the circumstances of the case, the Court declares that the impugned provisions shall become void as from 1 January 2011.

#### *Cross-references:*

Previous decisions of the Constitutional Court in the following cases:

- Judgment 04-03(99) of 09.06.1999; *Bulletin* 1999/2 [LAT-1999-2-003];
- Judgment 2001-06-03 of 22.02.2002; *Bulletin* 2002/1 [LAT-2002-1-002];
- Judgment 2002-06-01 of 04.02.2003;
- Judgment 2006-12-01 of 20.12.2006; *Bulletin* 2006/3 [LAT-2006-3-006];
- Judgment 2006-13-0103 of 04.01.2007;
- Judgment 2007-03-01 of 18.10.2007; *Bulletin* 2007/3 [LAT-2007-3-005];
- Judgment 2009-32-01 of 21.12.2009; *Bulletin* 2009/3 [LAT-2009-3-002].

European Court of Human Rights:

- *Langborger v. Sweden*, Judgment of 22.06.1989, para. 32;
- *Campbell and Fell v. The United Kingdom*, Judgment of 25.03.1992, para. 78;
- *Bryan v. The United Kingdom*, Judgment of 22.11.1995, para. 37;
- *Coeme and others v. Belgium*, Judgment of 22.06.2000, para. 120.

## Courts of other countries:

- Judgment of 01.06.1920, Supreme Court, the United States, *Evans v. Gore* 532 U.S. 245 (1920);
- Judgment of 15.12.1980, Supreme Court, US, *United States v. Will* 449 U.S. 200 (1980);
- Judgment of 06.12.1995, Constitutional Court, Republic of Lithuania, 3/95;
- Judgment of 18.09.1997, Supreme Court, Canada, Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3;
- Judgment of 15.09.1999, Constitutional Court, Czech Republic, Pl. US 13/99;
- Judgment of 04.10.2000, Constitutional Tribunal, Republic of Poland, 9/00;
- Judgment of 12.07.2001, Constitutional Court, Republic of Lithuania, 13/2000 -14/2000 - 20/2000 - 21/2000 - 22/2000 - 25/2000 - 31/2000 -35/2000-39/2000-8/01-31/01, para. 4.5;
- Judgment of 14.02.2002, Supreme Court, Canada, *Mackin v. New Brunswick* (Minister of Finance); *Rice v. New Brunswick*, [2002] 1 S.C.R. 405, 2002 SCC 13;
- Judgment of 18.02.2004, Constitutional Tribunal, Republic of Poland, 12/03;
- Judgment of 14.07.2005, Constitutional Court, Czech Republic, Pl. US 34/04;
- Judgment of 15.01.2009, Constitutional Court, Republic of Lithuania, 15/98, 33/03;
- Judgment of 11.12.2009, Constitutional Court, Republic of Slovenia, U-I-159/08-18.

## Languages:

Latvian, English (translation by the Court).

**Identification:** LAT-2010-2-002

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 13.05.2010 / **e)** 2009-94-01 / **f)** The Conformity of the words in the first sentence of Paragraph 1 of the Transitional Provisions of the Citizenship Law “if the registration takes place by 1 July 1995” and of the second sentence with Articles 1 and 2 of the Constitution of the Republic of Latvia, as well as with the Preamble of 4 May 1990 Declaration of the Supreme Soviet of Latvian S.S.R. “On the Restoration of the Independence of the Republic of Latvia” / **g)** *Latvijas Vestnesis* (Official Gazette), no. 77(4269), 18.05.2010 / **h)** CODICES (Latvian, English).

**Keywords of the systematic thesaurus:**

- 2.3.6 Sources – Techniques of review – **Historical interpretation.**
- 3.10 General Principles – **Certainty of the law.**
- 3.16 General Principles – **Proportionality.**
- 3.19 General Principles – **Margin of appreciation.**
- 5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**

**Keywords of the alphabetical index:**

Citizenship, dual / Occupation, consequences / Occupation, period / Citizenship, deprivation / Independence, state / Citizenship, continuity, principle / Annexation / Legal capacity, state / Diplomatic representatives / Political question, review / State, continuity.

**Headnotes:**

Dual citizenship acquired under the conditions of state occupation cannot be regarded as unlawful.

The principle of the continuity of citizenship envisages the legal duty of the state to restore, to the extent that is possible, the rights of those citizens who had them prior to the unlawful occupation of the state. At the same time it must be noted that in the context of the continuity doctrine, the state is not under a duty to register as citizens all persons who were the citizens of this state before it *de facto* lost its independence, and the descendants of such persons.

The adoption of the legal regulation on citizenship has a political aspect, which indirectly defines the limits of review by the Constitutional Court.

**Summary:**

I. The applicant, the Department of Administrative Cases of the Senate of the Supreme Court, argued that the impugned provision did not comply with Article 1 of the Constitution providing that Latvia is an independent democratic republic and the doctrine of continuity of the State of Latvia.

II. The Court notes the fact that the Citizenship Law *de jure* in force during the occupation of Latvia was binding on persons emigrating from Latvia. The Law provided for a prohibition of dual citizenship and provided that a person would lose Latvian citizenship if conferred citizenship of another state. However, the Constitutional Court notes that the Law could not be applied formally. Acts of Latvian diplomats during the occupation period were the only expression of Latvian statehood and their actions the only manifestation of

the legal capacity of the Latvian State. Thus, according to the State continuity doctrine, the legislator is bound to observe the practice established by the diplomats abroad during the occupation period.

During the occupation, Latvian representations allowed Latvian foreign passports to be retained in cases where persons had acquired another citizenship. At that time, the Latvian representations had to ensure, as far as possible, the preservation of statehood; therefore, the formal application of the Citizenship Law was impossible. Consequently, dual citizenship acquired by persons during the occupation cannot be recognised as illegal.

Upon restoration of independence, the rights of Latvian citizens had to be restored. This was done by introducing a registration procedure, namely, in the early 90s, Latvian citizens living either in Latvia or abroad had to register in the Population Register. The Court recognises that any person who was a citizen of Latvia during the pre-occupation period, irrespective of his or her place of residence, was regarded as a Latvian citizen. However, the legislator could not deliberately and unilaterally impose Latvian citizenship by ignoring the person's relations with other states. The free will of a person is of particular importance when citizenship rights are restored. Therefore, the requirement to register was justified.

Latvian citizens living abroad had the possibility of registering before a certain date and of keeping another citizenship. Although the 1994 Citizenship Law provided for less than one year for the registration, the period should start running from 1991, when the Supreme Council adopted the resolution on restoration of rights of Latvian citizens. The resolution allowed dual citizenship to be retained. Consequently, the total time was about three and a half years. Therefore, there are no grounds for arguing that persons who wished to have their Latvian citizenship restored did not have the possibility to register.

The Court notes that the Parliament, when adopting the Law on Citizenship, decided to observe the historical principle of prohibition of dual citizenship. The impugned provision provides for a special legal regime for persons who were forced to leave Latvia and acquired citizenship of another state during the occupation. In attempting to eliminate the negative consequences caused by the occupation, the Parliament provided for a mechanism that would ensure as fair a transition as possible.

Consequently, the Constitutional Court recognises that the impugned provision complies with the Constitution, as well as with the doctrine of continuity of the state.

The Constitutional Court recognises that the issues related to dual citizenship fall within the competence of legislator rather than the court. According to the established state practice, dual citizenship has always been regarded as an undesirable phenomenon. It can be derived from international law and the legal literature that dual citizenship is a political issue rather than one subject to judicial proceedings. Consequently, the issue on the admissibility of dual citizenship should be decided on by the legislator or the body of citizens.

#### *Cross-references:*

Previous decisions of the Constitutional Court in the following cases:

- Judgment 04-03(98) of 10.06.1998; *Bulletin* 1998/2 [LAT-1998-2-004];
- Judgment 04-07(99) of 24.03.2000; *Bulletin* 2000/1 [LAT-2000-1-001];
- Judgment 2005-12-0103 of 16.12.2005;
- Judgment 2006-04-01 of 08.11.2006;
- Judgment 2007-07-01 of 21.08.2007;
- Judgment 2007-10-0102 of 29.11.2007; *Bulletin* 2008/2 [LAT-2008-2-001].

#### *Languages:*

Latvian, English (translation by the Court).



# Liechtenstein

## State Council

### Important decisions

*Identification:* LIE-2010-2-001

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 15.09.2009 / **e)** StGH 2009/15+16 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

2.3.4 Sources – Techniques of review – **Interpretation by analogy.**

3.12 General Principles – **Clarity and precision of legal provisions.**

5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**

*Keywords of the alphabetical index:*

Arrest warrant, foreign / Absconding, danger.

*Headnotes:*

The objective scope of the fundamental right to individual freedom, based on Article 32 of the Liechtenstein Constitution (LV), also extends to the issuance of an arrest warrant. Since the issuance of an arrest warrant entails a grave encroachment on individual freedom, relatively stringent requirements must be laid down as to the legal foundation. Likewise, processes of reasoning by analogy are also to be restrictively applied, and an extensive interpretation of the letter of the law is inappropriate.

Mere failure to appear at the concluding hearing does not constitute flight, even without an abode in the national territory, nor does it substantiate a risk of the offence of absconding which would have warranted the issuance of an international arrest warrant. Such an extensive interpretation of the statutory basis infringes the fundamental right to individual freedom.

*Summary:*

I. The Regional Court (*Landgericht*) had issued an arrest warrant against the appellants for serious presumption of aggravated fraud. The international arrest warrant was founded on § 258, in conjunction with § 127.1.2 of the Code of Criminal Procedure (StPO), under the terms of which arrest is lawful where the suspect is or risks being at large or in hiding. The appellants never resided in Liechtenstein and did not appear at the concluding hearing, but lived at a settled address abroad. The arrest warrant was subsequently confirmed at last instance.

II. The State Council allowed the appeal brought against this decision as contrary to Article 32 of the Constitution. Indeed, mere failure to appear at the concluding hearing does not constitute flight, even without an abode in the national territory, nor does it substantiate a risk of the offence of absconding, which would have justified the issuance of an international arrest warrant. Such an extensive interpretation of the statutory basis infringes the fundamental right to individual freedom.

*Languages:*

German.



*Identification:* LIE-2010-2-002

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 17.09.2009 / **e)** StGH 2009/82 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

2.3.6 Sources – Techniques of review – **Historical interpretation.**

2.3.9 Sources – Techniques of review – **Teleological interpretation.**

3.12 General Principles – **Clarity and precision of legal provisions.**

3.13 General Principles – **Legality.**

5.1.3 Fundamental Rights – General questions – **Positive obligation of the state.**

5.2 Fundamental Rights – **Equality.**

5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom.**

5.4.19 Fundamental Rights – Economic, social and cultural rights – **Right to health.**

*Languages:*

German.

*Keywords of the alphabetical index:*

Smoking, ban / Smoking, area / Place receiving members of the public, regulations.



*Headnotes:*

The regulations must respect the framework established by the law and ensure that the rules outlined by the law are applied; they cannot create new rights and obligations and must respect the spirit and the intention of the law to be implemented. The interpretation found in the regulations on prevention of tobacco-related hazards (TPV), whereby the main room of a café (or a restaurant) may also be classed as a closed, isolated space specially designated as a smoking area, as prescribed by law, is no doubt possible from the standpoint of a grammatical and subjective historical interpretation. But this construction is at variance with the objective historical interpretation, and contradicts first and foremost the spirit and purpose of the law on prevention of tobacco-related hazards (TPG); in particular, it negates the exceptional character established by law as regards the provision of a smoking area.

*Summary:*

I. In the context of a petition signed by over 100 persons holding the right to vote, lodged within the prescribed time and instituting a procedure of review of the regulations on the basis of Article 20 StGHG, the State Council set aside Article 2.6 of the regulations on prevention of tobacco-related hazards (TPV) for incompatibility with the law and Constitution. Article 2.6 TPV afforded caterers the possibility of determining which part of their premises (main or adjacent room) could be considered a smoking area.

II. In the State Council's view, the framework established by statute was thus exceeded in that the regulations went beyond the stipulations of Article 3.1.c.1 of the law on prevention of tobacco-related hazards (TPG), under the terms of which smoking areas were specified to be closed spaces specially designated as such and isolated. The option allowed to every café (or restaurant) owner of also fitting out the main room of their café (or restaurant) as a smoking area was incompatible with the principle of the smoking ban and with the spirit of the rule of protecting the health of others.

# Lithuania

## Constitutional Court

### Important decisions

*Identification:* LTU-2010-2-005

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 20.04.2010 / **e)** 41/2000, 47/2001-08/2003-20/2003-32/2003-38/2003, 7/03-41/03-40/04-46/04-5/05-7/05-17/05, 35/04-37/04-72/06, 38/04-39/04, 06/05-08/05, 09/06-30/06-01/07-30/08, 15/98, 33/03 / **f)** On the interpretation of provisions of Constitutional Court rulings relating to reductions in pensions and remuneration during an economic crisis / **g)** *Valstybės Žinios* (Official Gazette), 46-2219, 22.04.2010 / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

*Keywords of the alphabetical index:*

Pension, reduction / Pensioner, payment / State employee / Official / Civil servant / Remuneration / Budget.

*Headnotes:*

Governments sometimes need to reduce the amount of the state social insurance old age pension temporarily and in a proportionate manner when an extreme situation arises, such as an economic crisis. In such instances, the size of the reductions must be governed by the amount of contributions and the period over which they have been paid and the contributions made by those to be affected, when they were still able to work and were economically active, to the accumulation of the funds of the state social insurance. A legal regulation which would make greater reductions to the old age or disability pension awarded to somebody who was in employment or running a business than to the old age or disability pension awarded to somebody who was not working or running a business is not permissible. A pension which only just covers its recipient's basic

social needs and living conditions may not be reduced at all. The legislator is under an obligation to provide for a mechanism for compensation of losses incurred by the recipients of old age or disability pensions, which would allow the state to compensate them in a timely and fair manner once the crisis which has precipitated the cuts is over.

Any reduction in remuneration must be in line with the legitimate objectives which are important to society; it must be necessary in order to achieve those objectives and must not result in unnecessary restrictions on individual rights and freedoms. In difficult economic and financial times, when temporary reductions are needed in the pay of officials and civil servants working for institutions that are funded from state and municipal budgets in order to secure the vitally important interests of society and the state and to protect other constitutional values, the legislator must establish a uniform and non-discriminatory scale of reduction, in a manner which is consistent with the level of remuneration established with regard to different categories of officials and state servants of institutions funded from state and municipal budgets before the onset of the difficult economic and financial situation facing the state.

*Summary:*

I. Parliament asked the Constitutional Court for advice on the provisions in some of its rulings on constitutional requirements at times of economic crisis concerning reductions in social pensions and civil servants' salaries.

II. The Court noted that the requirements mentioned above, which stem from the constitutional principles of a state under the rule of law (equality of rights, justice, proportionality, protection of legitimate expectations, legal certainty, legal security and social solidarity and other constitutional imperatives), must be heeded when the nation is facing an extreme situation (such as an economic crisis), resulting in changes to the national economic and financial situation (in spite of various measures undertaken with a view to overcoming the economic crisis) to the extent that the accumulation of funds necessary for the remuneration of the work of officials and civil servants at institutions that are funded by state and municipal budgets or the funds necessary for the payment of pensions is not secure and as a result amendments are needed to the legal regulation which will result in a reduction in the remuneration and pensions of such persons.

The Court emphasised that the constitutional concept of the State Budget, *inter alia* the constitutional institution of a budget year, implies that in times of



national economic crisis, as outlined above, reductions in remunerations and pensions are allowed for a maximum of one budget year. A duty is incumbent on the legislator, arising from the constitutional institution of a budget year, in the course of deliberating upon and approving the State Budget for the following year, to reassess the actual economic and financial situation in the state and to decide whether the situation is still particularly grave, and, in particular, whether the collection of the State Budget revenue is still in such disorder that the state is unable to perform its obligations. The legislator will then need to decide whether, for the forthcoming budget year, a legal regulation is needed to govern payment of the reduced remuneration and pensions.

III. No dissenting opinions were attached to this opinion.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2010-2-006

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 13.05.2010 / **e)** 04/08-11/08 / **f)** On investigation by administrative courts into actions by the President of the Republic and the Government and on the dismissal of a member of the State Gaming Control Commission / **g)** *Valstybės Žinios* (Official Gazette), 56-2766, 15.05.2010 / **h)** CODICES (English, Lithuanian).

#### *Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers.**  
 4.4.3.2 Institutions – Head of State – Powers – **Relations with the executive bodies.**  
 4.7.9 Institutions – Judicial bodies – **Administrative courts.**

#### *Keywords of the alphabetical index:*

Administrative courts, jurisdiction / President of the Republic, activities / Government, action, review of constitutionality / State power.

#### *Headnotes:*

A legal regulation that precludes investigation of the actions of the President of the Republic and of the Government by the administrative courts when these actions are not under the control of the Constitutional Court (such as a refusal by the government to adopt a decision or to take a particular step) is in conformity with the Constitution. The actions of the President or the Government, whereby state power is implemented, cannot form the subject matter of an administrative dispute under consideration in an administrative court.

#### *Summary:*

I. Two administrative courts lodged a case with the Constitutional Court, challenging the provisions concerning the competence of administrative courts, and in particular the exclusion of their competence from investigating actions of the President of the Republic and the Government which do not fall within the remit of the Constitutional Court. The issue had also arisen of a presidential decree on the dismissal of a member of the State Gaming Control Commission which was being contested before the Court.

II. The Court observed that the peculiarities of the constitutional status of Parliament, the President of the Republic, the Government, and the Judiciary with respect to the implementation of state power and the separation of state powers imply that these institutions may not assume each other's constitutional powers. It follows, therefore, that the courts to which various persons have applied with petitions requesting investigation of actions by Parliament, the President of the Republic, or the Government may not assume the constitutional powers of Parliament, the President of the Republic, or the Government, by adopting corresponding decisions for these institutions or placing them under an obligation to pass acts connected to the implementation of state power. The phrase “the actions of the President of the Republic, the Government (as a collegial body)” in the legislation under dispute means actions whereby state power is implemented. These actions should not be equated with those falling under the category “public administration” as set out in the Law on the Proceedings of Administrative Cases. Administrative courts decide on administrative cases concerning disputes arising from administrative legal relations which emerge *inter alia* during the performance of public administration by state institutions. They do not decide on disputes arising from other non-administrative legal relations.

Having stated that administrative courts may consider cases concerning the consequences of failure to act by the President or the Government which could give rise to a breach of individual rights or freedoms, for example in connection with compensation for damage, the Constitutional Court also pointed out that the disputed provision does not prevent somebody who believes the actions of the President or Government have resulted in a breach of his or her rights and freedoms from implementing his right to apply to court, which is entrenched in Article 30.1 of the Constitution.

Concerning the presidential decree on dismissal of a state officer, the Court noted that the powers of the President of the Republic entrenched in Article 84.10 of the Constitution allow the legislator to determine which state officials may be appointed and dismissed by the President. The legislator must also establish the grounds for their appointment and dismissal from office. Under Article 84.10, requirements for state officials who are appointed by the President of the Republic must be established in laws, including requirements of an ethical and moral nature. Thus, officials must be of impeccable reputation. Their conduct, whether or not it is related to the direct performance of their duties, must not bring them or the state institution where they work into disrepute. The legislator, when establishing the grounds for dismissal of such officials, must pay heed to the constitutional principle of a state under the rule of law. This means that state officials who violate the Constitution and laws, who place personal or group interests above those of society and discredit state power by their actions, are legally accountable under the procedure established by laws. The Constitution does not tolerate any legal and factual situation which would allow state officials and other persons with responsibility for decisions of vital importance to society and the state to act with impunity in the manner outlined above. Dismissal from office is one of the consequences of such actions.

III. No dissenting opinions were attached to the ruling.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2010-2-007

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 29.06.2010 / **e)** 06/2008-18/2008-24/2010 / **f)** On state pensions of judges / **g)** *Valstybės Žinios* (Official Gazette) / **h)** CODICES (English, Lithuanian).

#### *Keywords of the systematic thesaurus:*

4.7.8 Institutions – Judicial bodies – **Ordinary courts.**  
5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**  
5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

#### *Keywords of the alphabetical index:*

Judge, independence / Court, independence / Judge, status / Pension, judge / Term of office.

#### *Headnotes:*

The legislator is obliged to draw a distinction between the social and material guarantees of judges, according to the court system and level where the judge works. In legislation governing the granting of pensions to judges and the amount of pension awarded, no account was taken of the specific constitutional status of the Constitutional Court as an independent court system, and the fact that Constitutional Court justices are appointed for a single nine-year term of office.

#### *Summary:*

I. The petitioner, the Vilnius Regional Administrative Court, asked the Constitutional Court to investigate the constitutional compliance of legal regulations governing the granting of state pensions to judges.

II. The legal regulation under dispute determines the size of pension granted to judges in line with the period of time they have worked as a judge (with a “crescent” every five years). It means that those who were justices of the Constitutional Court for the entire nine-year term of office provided for in the Constitution and who only have a nine-year work record as a Constitutional Court justice, as well as those whose work record spans between five and ten years of work in other courts (irrespective of the court system and level and therefore including the lowest level of court) are granted judges’ state pensions by applying the lowest percentage of the state pension (i.e. 10 percent of the average remuneration for work received by the judge). Article 6.2 of the Law on the State Pensions of Judges sets out the procedure for calculating the state pension for judges without a

twenty-year work record in a judicial capacity, and the amount of pension awarded. In formulating this provision, no account was taken of the specific constitutional status of the Constitutional Court as an independent court system, and the fact that Constitutional Court justices are appointed for a single nine-year term of office. Therefore, the requirement that stems from the Constitution, specifically Article 109.2, to differentiate between the social (material) guarantees of judges according to the court system where the judge works is violated and the imperative of justice arising from the constitutional principle of a state under the rule of law is denied.

The Court also emphasised that the legal regulation establishing a differentiation of judges' state pensions focusing on a work record of five years as a judge creates preconditions to make a completely equal level of pension for judges with work records of very different durations, and at the same time it creates preconditions whereby judges with very little difference in the duration of their working lives will be granted pensions of very different amounts. This legal regulation is not, therefore, in line with the constitutional concept of the state pension of judges as a social and material guarantee for them upon the expiry of their powers, and the provisions of Article 109.2 of the Constitution and the requirements of justice, proportionality, and reasonableness which stem from the constitutional principle of a state under the rule of law.

When the legislature is enacting legislation which sets out the maximum amount of pension and methods of establishing the amount, it must bear in mind the fact that state pension for judges is a social (and material) guarantee for them when their powers expire. It stems from the Constitution and is not only protected under Article 109 of the Constitution, but also under Article 52. This social and material guarantee must also reflect the gravitas and constitutional status of the judge. It must be real, not simply nominal. Any other interpretation would deny the essence and purpose of the state pension as a social and material guarantee for a judge at the end of his or her term of office. It could result in deviation from the requirements arising from the Constitution (in particular Article 109.2) and the constitutional principle of a state under the rule of law.

Where there are fundamental changes in the national economic and financial situation and special circumstances have arisen, such as an economic crisis or a natural disaster, there may be insufficient funds to perform the functions of the state and to satisfy the public interest. It follows that there may then be insufficient funds to fulfil the financial needs

of the court system. In such circumstances, the legislator may make changes to the legal regulation governing remuneration and pensions, and enact legislation which may be less favourable to those affected, if this is necessary in order to ensure the vital interests of society and the state and to protect other constitutional values. Judges' remuneration and pensions may also be reduced. If, in difficult and economic times, it was not possible to cut back only on court financing or only to reduce judges' pay and pensions, it would mean that courts were being singled out from other bodies which implement state power, and judges from among the ranks of those who implement power in corresponding institutions of state power. The consolidation of such an exceptional situation for courts and judges would not be in line with the requirements of an open, fair and harmonious civil society and of the imperatives of justice.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2010-2-008

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 30.06.2010 / **e)** 13/04-21/04-43/04, 38/04-39/04 / **f)** On the construction of the Constitutional Court rulings on the extension of a judge's powers / **g)** *Valstybės Žinios* (Official Gazette), 79-4078, 03.07.2010 / **h)** CODICES (English, Lithuanian).

#### *Keywords of the systematic thesaurus:*

4.7.4.1.4 Institutions – Judicial bodies – Organisation – Members – **Term of office.**  
4.7.4.1.5 Institutions – Judicial bodies – Organisation – Members – **End of office.**

#### *Keywords of the alphabetical index:*

Judge / Judge, retirement, age / Term of office, extension.

#### *Headnotes:*

During the period of extension of his powers, a judge may administer justice as a “fully-fledged judge, (for

example as a judge, a judge-rapporteur, and a member of the college) in other cases assigned to him after his powers have been extended, but only until the consideration of certain cases, which was not finished at the date his powers were extended, is complete.

*Summary:*

I. The Šiauliai Regional Court and the Supreme Court of Lithuania, the petitioners, asked the Constitutional Court to interpret the official constitutional doctrinal provisions which are related to the extension of a judge's powers. Specifically, clarification was requested as to whether the phrase "fully-fledged judge", formulated in Constitutional Court rulings, means that the judge only enjoys fully-fledged powers in the concrete cases indicated in the decree of the President of the Republic on the extension of powers of the judge. Clarification was also needed of the provision to the effect that the judge, during the extension period, must receive the same workload as other judges of that court and whether this meant that, during the extension period, as long as the cases indicated in the presidential decree were not completed, he could act as a judge, judge-rapporteur or member of the college in other cases not indicated in the decree.

II. One of the guarantees of the independence of the judge entrenched in the Constitution is the guarantee of the term of his powers. The guarantee of the inviolability of the term of powers of the judge is also important because of the fact that a judge, whatever political forces are in power, must remain independent and unaffected by a possible change in political power. The Constitution does not rule out the enactment of legal regulation which would allow a judge whose term of office has expired or who has reached the pensionable age stipulated by law to allow him to remain in office for a certain period of time until the consideration of certain cases (the consideration of which was not finished at the date when the judge's term of office expired or he reached pensionable age). This type of exceptional legal regulation would be constitutionally grounded. Without it, the decision-making process in corresponding cases – administration of justice – would slow down, individual rights and legitimate interests would be jeopardized and certain constitutional values undermined.

The extension of a judge's powers is allowed only in exceptional cases and a decree by the President of the Republic is required (or a Parliamentary resolution in the case of the extension of the powers of a justice of the Supreme Court). Any other interpretation would give rise to problems. For

example, on the day his term of office expired, the judge might be coming to the end of the consideration of a complicated matter, where most of the procedural actions are already complete and certain final actions require completion, such as the adoption, drawing up and promulgation of the final decision. Once the judge finishes the consideration of those cases which he had not finished considering at the date when his term of office expired or he reaches pensionable age, he must be dismissed from office and his powers must be discontinued under the established procedure directly the legal event described above occurs (once consideration of the cases to which the term of the extension of powers of the judge is related is finished. Consequently, such a judge must be dismissed from office and he may no longer consider any other cases (including those assigned for his consideration as a fully-fledged judge during the period of the extension of his powers and the consideration of which was not complete at the point when the consideration of the cases to which the term of the extension of his powers is related, had ended).

III. One dissenting opinion was attached to this decision.

*Languages:*

Lithuanian, English (translation by the Court).



# Mexico

## Supreme Court

### Important decisions

*Identification:* MEX-2010-2-009

**a)** Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 26.06.2002 / **e)** 166 / **f)** Contradicting Resolutions 21/2001-PS Between the Third Collegiate Civil Court of the Sixth Circuit and the Thirteenth Collegiate Civil Court of the First Circuit / **g)** *Semanario Judicial de la Federación*, Tome XVII, February 2003, 175; IUS 184, 862; *Relevant Decisions of the Mexican Supreme Court*, 489-490 / **h)**.

*Keywords of the systematic thesaurus:*

5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings.**

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**

*Keywords of the alphabetical index:*

Evidence, accounting, expertise / Interest, compensation, calculation.

*Headnotes:*

Whenever interests are claimed in a commercial lawsuit and accounting knowledge is required to make a decision, it is not necessary to clarify the way to calculate it nor to attach evidence such as an expert accounting report.

*Summary:*

I. The First Chamber of the Supreme Court considered that there was a contradiction between the opinions of the Sixth Circuit Civil Court and the First Circuit Civil Court, with regard to the interpretation of Article 1348 of the Code of Commerce. The first of these courts argued that the aforementioned Article, which regulates the execution of a sentence in commercial proceedings, does not set forth any evidential opportunity at all, as a result of which the settlement is performed in accordance

with the proof that was already presented in the course of the hearing. The other court claimed that, in the processing of incidents, when it becomes necessary to present proof, the judge is obliged to grant a period of time for answering complaints in order to demonstrate the incidental action or exception, which means it is not necessary for the plaintiff to present, along with the demand, the correct net amount regarding ordinary interest and late payment charges claimed.

The subject in dispute consisted of determining whether or not, in accordance with Article 1348 of the Code of Commerce, the amount and the means of quantifying interest should be specified when the initial claim brief is filed.

II. The First Chamber, for its part, resolved that its own criterion should prevail as jurisprudence, coinciding with the one upheld by the First Circuit Thirteenth Collegiate Civil Court. In effect, the Judges of the First Chamber resolved that the ordinary interest and late payment charges should, as they are part of the principal, be claimed in the respective initial claim brief, as the Judge will be in charge of setting the net amount or the basis for the quantification thereof for the sentence execution period. Regardless of the subject, when it is necessary to present proof in the processing of incidents, the judge shall be obliged to grant a period of time for answering complaints in order for the parties to demonstrate their incidental intention. As a result, if the law does not require the plaintiff to attach to his claim the expert accounting report, nor the methods for calculating the aforementioned interest, then the Judge must grant the aforementioned period of time for answering complaints to the parties, in order to demonstrate his actions and exceptions in the respective incident.

The Chamber concluded that to uphold the contrary, in other words, to demand that the plaintiff attach the expert's report or mechanics for calculating interest to his claim, would be an imposition upon him or her of a procedural burden not set forth in the law, which would entail prejudice, not set forth in the law either, in the event of noncompliance.

*Languages:*

Spanish.



**Identification:** MEX-2010-2-010

**a)** Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 12.07.2002 / **e)** 167 / **f)** Constitutional controversy 32/2002 / **g)** *Semanario Judicial de la Federación*, Tome XVI, July 2002, 469, 998, 999, 1000; IUS 186, 551; 186, 657; 186, 580; 186, 581; *Relevant Decisions of the Mexican Supreme Court*, 491-493 / **h)**.

**Keywords of the systematic thesaurus:**

4.4.3.1 Institutions – Head of State – Powers – **Relations with legislative bodies.**

4.6.2 Institutions – Executive bodies – **Powers.**

**Keywords of the alphabetical index:**

Competence, legislative / Executive, powers to initiate legislation / Tax, exemption, competence.

**Headnotes:**

The power to set forth tax exemptions pertains exclusively to the Legislator and not to any other power.

**Summary:**

I. By means of a constitutional dispute, the House of Representatives of Congress demanded the annulment of the “Decree exempting payment of taxes and extending the aforementioned tax incentive”, issued by the President and extended by the Minister of Finance and Public Credit. Article 1, and temporary Articles 1 and 2, were challenged on the grounds that they infringed Articles 28.1, 31.IV; 49, 72.f, 73.VII, 74.IV and 30 of the Federal Constitution.

II. The Supreme Court considered that the aforementioned decree, issued by the President under Article 39.I of the Federal Tax Code, temporarily exonerating taxpayers who used sweeteners other than cane sugar from paying a special tax on production and services (IESPS), infringed the aforementioned Article as well as Article 89.I of the Constitution, because it had been issued without any of the extraordinary situations derived from natural, social, or economic phenomena, as required by law. In other words, these are unforeseeable events that the legislator could not have been aware of when he created the tax.

Article 39.I of the Federal Tax Code, certainly empowers the President to temporarily exonerate

certain regions or groups of persons from paying of taxes, through resolutions of a general nature, whenever any natural, social, or economic phenomena that the Legislator was unable to foresee when the tax was set forth, affects or may affect the economic circumstances of a region of the country, a field of activity, the production or sale of products or the performance of an activity. Given that this power does not entail the setting forth of tax exemptions, the decision to exonerate certain taxpayers or regions from paying a tax and its accessories must be justified with one of the aforementioned suppositions.

Article 73.VII of the Constitution sets forth that Congress is empowered to set, through laws, the taxes necessary to cover the public budget. On the other hand, Article 89, Article I of the Constitution obliges the Federal Government to collect such taxes in accordance with these laws. Therefore, when Article 39.I of the Federal Tax Code allows the exoneration of certain taxpayers in relation to taxes and accessories, in either partially or in full, for a given time, provided that emergency situations arise and through the issuance of resolutions of a general nature, this power is limited to exonerating said taxpayers from payment, but does not amount to the setting forth of tax exemptions, which is a function that corresponds exclusively to the Legislature in terms of setting taxes.

In effect, Articles 31.IV; 49, 50, 70 and 73.VII of the Federal Constitution, set forth that only the Legislature may, in a law, specify taxes and their basic elements. This principle of legal reserve is reiterated under Article 28.1 of the Constitution, insofar as it indicates that exemptions are prohibited “in the terms and conditions set by law.” If tax exemption consists of exonerating certain individuals from their tax obligations for reasons of fairness, convenience, or economic policy, which would affect the generation and amount of such obligations, it follows that the exemption is incorporated into the tax system, so that the approval, configuration, and scope thereof must be performed only by laws in a formal and material manner.

In conclusion, the Court declared that temporary Articles 1 and 2 of the challenged decree were invalid.

**Languages:**

Spanish.



*Identification: MEX-2010-2-011*

**a)** Mexico / **b)** Supreme Court / **c)** Plenary / **d)** 06.10.2002 / **e)** 171 / **f)** Constitutional controversy 82/2001 / **g)** *Semanario Judicial de la Federación*, Tome XVI, September 2002, 1136; IUS 185, 941; *Relevant Decisions of the Mexican Supreme Court*, 503-504 / **h)**.

*Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers.**

4.1.1 Institutions – Constituent assembly or equivalent body – **Procedure.**

4.5.8 Institutions – Legislative bodies – **Relations with judicial bodies.**

4.7.1 Institutions – Judicial bodies – **Jurisdiction.**

*Keywords of the alphabetical index:*

Constitution, amendment, validity / Supreme Court, admissibility, decision, incompetence.

*Headnotes:*

The process of reforming and adding to the Federal Constitution is not under jurisdictional control.

*Summary:*

I. The Supreme Court, decided to dismiss constitutional controversy 82/2001, which had been filed to challenge the procedure for making reforms and additions to the Federal Constitution in the field of the rights of indigenous peoples. Article 105.I of the Federal Constitution, as well as a number of explanations of the grounds and judgments in connection with reforms of the Constitution, set forth that the legal grounds of the constitutional controversy involve protecting the scope of powers of the state agencies derived from the federal system and from the principle of the division of powers, as a result of any acts or general provisions that contravene the fundamental norms; that is to say, to acts in the strictest sense of the word, and ordinary laws and regulations (federal, local or municipal) and even international agreements.

II. The aforementioned constitutional Article does not contemplate, among the agencies, authorities or bodies that can be a party to a constitutional controversy, or the Constitutional Reform Body – set forth under Article 135 of the Constitution – for his is not a body of the same nature as those to which the functions of government are entrusted, in addition to the fact that it comprises federal and local bodies, as it is exclusively responsible, as is established in the

Federal Constitution, for agreeing to reforms thereof and additions thereto, thus establishing the powers and competencies of government agencies, without this referring to constitutional regulation either, given that Article 105.I of the Federal Constitution refers to “general provisions”.

Similarly, Article 135 of the Constitution considers that the procedure for making reforms and additions to the Federal Constitution is not subject to jurisdictional control, given that the function performed by the Congress in accepting on modifications, or by the state legislatures in approving them, and the former or the Permanent Committee in counting the votes of the local legislators along with, if applicable, the declaration of approval of constitutional reforms, is not by nature isolated from ordinary agencies that have been established, but lies in the extraordinary nature of the constitutional Reform Body, by carrying out a function of a purely constitutional nature not comparable to that of any partial legal order. This amounts to a sovereign function that is not subject to any type of external control, because the guarantee of an agency lies in its own complex make-up and constitutional powers.

*Languages:*

Spanish.

*Identification: MEX-2010-2-012*

**a)** Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 22.11.2002 / **e)** 177 / **f)** Contradicting Resolutions 104/2001 – PS Between the First Collegiate and Second Collegiate Criminal Courts of the Third Circuit / **g)** *Semanario Judicial de la Federación*, Tome XVII, February 2003, 96; IUS 184, 957; *Relevant Decisions of the Mexican Supreme Court*, 521-522 / **h)**.

*Keywords of the systematic thesaurus:*

3.12 General Principles – **Clarity and precision of legal provisions.**

3.14 General Principles – **Nullum crimen, nulla poena sine lege.**

4.11.1 Institutions – Armed forces, police forces and secret services – **Armed forces.**

*Keywords of the alphabetical index:*

Arm, munition, use, control / Arms, right to bear, limitation / Arm, possession, unlawful.

*Headnotes:*

The possession of cartridges for weapons for exclusive use by the National Army, Navy, and Armed Forces is punishable in terms of the Firearms and Explosives Act.

*Summary:*

I. The Third Circuit Criminal Court considered atypical that the offense of possessing ammunition for the exclusive use of the National Army, Navy, and Air Force for the Firearms and Explosives Act did not specify the number of cartridges that an individual may legally possess. Whenever an individual was deemed to be in possession of a number of cartridges exceeding the legal maximum number permitted, the respective punishment was in accordance with that contemplated under Article 83 Quat, Section II of the Firearms and Explosives Act by way of a sanction established for all firearms referred to under Article 11.c to 11.f. However, neither the Firearms and Explosives Act nor its regulations contemplated the circumstances or peculiarities necessary to actually set the figure. The Third Circuit Criminal Court was of the opinion that the possession of firearm cartridges for exclusive use was punishable irrespective of the number of cartridges. The fact that possessing and carrying firearms for the exclusive use of the Army was prohibited necessarily meant that any possession of cartridges, independently of their number, complied with that established under numeral 83 Quat, Sections I and II in relation to Article 11.a, 11.b, 11.c and 11.f of the aforementioned federal law.

II. The First Chamber of the Supreme Court concluded that there was a discrepancy between the two criteria in terms of whether the possession of cartridges for the exclusive use of the National Army, Navy and Air Force was punishable or not. The Chamber then indicated that following a systematic interpretation of Articles 9, 10, 10bis, 11, 50, 77, Sections I and IV, and 83 Quat of the Firearms and Explosives Law it was evident that the possession of firearm cartridges for the exclusive use of the National Army, Navy and Air Force was characterised under the last Article invoked. Its first Section contemplated the number of cartridges for the weapons mentioned in Article 11.a and 11.b of the respective Law while Section II mentions those for the weapons mentioned in Article 11.c to 11.e. In both

cases, irrespective of numbers, only members of the armed forces or authorised individuals may possess firearms as established in the last paragraph of aforementioned Article 11.

The Chamber emphasised that a systematic interpretation of Articles 9, 10, 10bis, 11, 50, 77, Sections I and IV and 83 Quat of the Firearms and Explosives Law made it evident that it was not the legislators wish for individuals to carry or possess firearms reserved for the exclusive use of the Army, Navy and Armed Forces, or the accompanying ammunition in the form of cartridges. For this reason, the possession of such cartridges could be susceptible to the penalties contemplated under the latter numeral mentioned above. Although the Law did not establish a specific number of cartridges corresponding to weapons of exclusive use, this was in response to the fact that possessing or carrying this type of weapon is considered an offence whenever the carrier or owner of such weapons does not belong to the armed forces. Thus if the individual is not authorised to possess or carry such weapons, neither can he be authorised to possess or carry the related cartridges. The Chamber also clarified that the expression “amounts in excess of those permitted” as in Section I of aforementioned numeral 83 Quat, should not be interpreted in a grammatical fashion but, rather, in its systematic sense. Following the premise that the legislator expressly prohibited individuals from possessing or carrying weapons reserved for the use of the armed forces, it may be concluded that the possession of cartridges, which are accessories of such weapons, is also prohibited. Therefore, the possession of any number of cartridges may be punished.

*Languages:*

Spanish.

*Identification: MEX-2010-2-013*

**a)** Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 07.02.2003 / **e)** 178 / **f)** Contradicting Resolutions 114/2001-PS Between the Third Collegiate and Fifth Collegiate Criminal Courts of the First Circuit / **g)** *Semanario Judicial de la Federación*, Tome XVII, April 2003, 9; IUS 184, 531; *Relevant Decisions of the Mexican Supreme Court*, 523-525 / **h)**.



*Keywords of the systematic thesaurus:*

5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**

5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Criminal proceedings.**

5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges.**

*Keywords of the alphabetical index:*

Crime, qualification / Criminal procedure, preparatory phase, guarantee / Arrest, warrant, offence, qualification, requirement / Detention, lawfulness.

*Headnotes:*

The modalities or qualification of the offence must be included in the arrest warrant.

*Summary:*

I. The First Circuit Criminal Law Courts analysed the contents of Article 19 of the Federal Constitution and Article 122 of the Federal District Code of Penal Procedures and reached contradicting conclusions.

One of the First Circuit Criminal Courts was of the opinion that the arrest warrant should include a study of the classification as a basis for the defense of the accused, as well as the offence imputed, along with the place, time and circumstances surrounding its execution, and the information resulting from the preliminary investigation. This should suffice to prove the body of the crime and to support the probable responsibility of the accused (who must be certain that the elements in question are accredited). Another Court maintained that the arrest warrant need not include the type of offense and should only indicate details of the accused, place, time and circumstances surrounding the execution of the crime, as well as other information provided by the preliminary investigation that should be sufficient to accredit the body of the crime and the probable responsibility of the defendant.

II. The First Chamber of the Supreme Court determined the existence of contradicting opinions and decided that its criterion should prevail through jurisprudence.

Article 19.1 of the Federal Constitution, reformed by public decree and published in the Official Gazette on 8 March 1999, establishes the following:

No detention by the judicial authorities should exceed 72 hours as from the moment the defendant is brought before the authorities without the support of an arrest warrant showing: the alleged offence; place, time and circumstances surrounding the execution of such offence, and the information provided by the preliminary investigation, which must suffice to prove the body of the crime and the probable responsibility of the accused.

A study of this numeral leads to the conclusion that for the accused to have legal confidence in the proceedings undertaken against him, the judicial authorities should not, when issuing the arrest warrant, limit their action to the study of aspects relating to the body of the crime and the probable responsibility of the defendant. They should also analyse the type or classification of the offence in question irrespective of whether such modalities can be proven in the course of the respective lawsuit and independently of the decision adopted to define the degree of responsibility of the accused; it is precisely during such proceedings that the accused is allowed to exercise the legitimate right to present evidence and make the declarations he deems convenient.

The First Chamber decided that the study into the type or classification of offence should be undertaken at the time the arrest warrant is issued, irrespective of whether such classification is accredited or discarded in the course of the proceedings; i.e., should the judge adopt a judgment on an offence, differing on the degree to that originally envisaged in the aforementioned proceedings, the judge may then analyse the degree or the classifications on the basis of the evidence leading him to such conclusion. In the judgment issued in the above terms, the judge may even refer to the material facts that were the object of the investigation provided that the prosecuting authorities have reached accusatory conclusions and may change the classification given to the offence in the warrant of arrest, provided that the defendant's defense with regard to the new classification is heard during the proceedings.

In short, the First Chamber ruled that, in accordance with the aforementioned guidelines, in order to protect the legitimate and full right of the defendant's defense and to ensure that the defendant has full legal confidence in the proceedings, the acting judge should, in principle, specify in the arrest warrant not only the basic or fundamental type of alleged offence or offences, but should also indicate the related modalities, aggravating circumstances or co-related

classifications invoked by the prosecuting authorities. Alternatively, should the acting judge determine that evidence brought forward in the proceedings serves to corroborate the existence of classifications other than those contained in the aforementioned warrant of arrest, this may be reflected in the related judgment adopted, following a hearing with the accused.

Finally, the First Chamber ruled that whenever the type of offence indicated on the arrest warrant cannot be accredited during the proceedings, but a more serious classification is considered, it is then the responsibility of the prosecuting authorities to lay this down in its report. On the other hand, in the event that it is possible to accredit a less serious modality but not the one in question, it is then the responsibility of the judge to determine this in his or her judgment.

#### *Languages:*

Spanish.



#### *Identification:* MEX-2010-2-014

**a)** Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 04.03.2003 / **e)** 181 / **f)** Constitutional controversy 11/2002 Judicial Branch of the State of Tlaxcala / **g)** *Semanario Judicial de la Federación*, Tome XVII, March 2003, 1305; 184, 621; *Relevant Decisions of the Mexican Supreme Court*, 533-534 / **h)**.

#### *Keywords of the systematic thesaurus:*

3.4 General Principles – **Separation of powers.**

4.7.4.1.2 Institutions – Judicial bodies – Organisation – Members – **Appointment.**

4.7.4.1.6.1 Institutions – Judicial bodies – Organisation – Members – Status – **Incompatibilities.**

5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**

#### *Keywords of the alphabetical index:*

Judge, aptitude, requirement / Judge, qualifications / Judicial independence.

#### *Headnotes:*

Political factors must not interfere in the appointment of judges.

#### *Summary:*

I. Through a constitutional controversy, the State of Tlaxcala Judiciary challenged the decision made by the governor of the aforementioned state to appoint Hugo Morales Alanis as Magistrate of the Superior Court. The latter had served as the government's Deputy Technical Minister in the year prior to his appointment as Magistrate. According to the plaintiff, the appointment made by the governor contravened Articles 116 and 95 of the Federal Constitution because it allegedly represented the governor's wish to have a representative within the Judiciary. This was contrary to the autonomy and independence of the State Court and the separation of powers principle.

II. The Supreme Court emphasised that under Article 116.III and Article 95.I to V of the Constitution, it was clear that, in order to guarantee the independence of Magistrates and Judges in the exercise of their duties, local constitutions are required to establish conditions governing the appointment, training and permanence of such Magistrates and Judges; State Magistrates are obliged to fulfill the requirements indicated under Sections I to V of Article 95; and no person who has served as Deputy Minister, public prosecutor, or local representative or in equivalent positions in their respective entities in the year prior to their designation may be appointed.

Article 116.III of the Federal Constitution was reformed on 31 December 1994. On that occasion, the body responsible for reviewing the Constitution sought to strengthen the independence of Federal Judiciary entities to ensure that political factors did not interfere in the appointment of Magistrates. In this sense, the third paragraph of Section III Article 116 of the Federal Constitution ruled out the possible appointment of Magistrates who had served as deputy ministers or their equivalent, public prosecutors, or local representatives of their respective states during the year prior to appointment.

Articles 1, 2, 5, 10, 17 and 18 of the Internal Regulations of the State of Tlaxcala Ministry of the Interior make it evident that the Head of the State Technical Ministry cannot and should not be considered equivalent to a state minister for, as established in the aforementioned articles, the government's Chief Advisor is appointed by the minister with prior authorisation from the state

governor – though not directly appointed by the latter. Moreover, the aforementioned Deputy Technical Minister is directly responsible to the state's Ministry of the Interior and is thus subordinate to the head of such entity. In any case, the equivalent to the minister referred to under Article 116 of the Federal Constitution is an officer with authority and responsibility analogous to that of a minister; that is to say, those considered equal to a minister are those who despite not being textually mentioned in the cited norms – 1, 10-12, 14-17 and 24 of the Tlaxcala Public Administration Act – are, like the State Ministers, subject to impeachment proceedings and freely appointed by the State governor and Heads of an agency of the executive branch.

It is therefore evident that Hugo Morales Alanis did not, prior to his appointment as Judge of the State of Tlaxcala Superior Court, serve in any position equal to minister, Public Prosecutor, or local representative; the allegedly unconstitutional acts did not invade the autonomy of the State of Tlaxcala Judiciary or contravene that contemplated in the precepts analysed as part of the Federal and State of Tlaxcala Constitutions.

#### *Languages:*

Spanish.



#### *Identification:* MEX-2010-2-015

**a)** Mexico / **b)** Supreme Court / **c)** First Chamber / **d)** 19.03.2003 / **e)** 182 / **f)** Contradicting opinions 81/2002-PS, between the Second and Third Collegiate Courts of the Twenty-third Circuit / **g)** *Semanario Judicial de la Federación*, Tome XVII, April 2003, 88; IUS 184, 341; *Relevant Decisions of the Mexican Supreme Court*, 535-536 / **h)**.

#### *Keywords of the systematic thesaurus:*

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.  
5.3.13.1.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – **Civil proceedings**.

5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence**.

5.3.32 Fundamental Rights – Civil and political rights – **Right to private life**.

#### *Keywords of the alphabetical index:*

Damage, irreparable / DNA, testing, data, access / Evidence, admissibility / Expert, opinion / Parentage, right to know.

#### *Headnotes:*

The admission and presentation of expert genetic evidence in paternity proceedings affect the fundamental rights of the individual. A decision to ask for such evidence must be taken on the basis of a court order which can be challenged.

#### *Summary:*

I. The contradicting Resolutions of the Second and Third Collegiate Courts of the Twenty-third Circuit were the following: one resolution maintained that the admission of expert evidence to identify the genetic imprint (DNA) of an individual in paternity proceedings does not bring irreparable consequences for the defendant and does not affect his individual rights, while the other maintained that the afore-mentioned expert evidence was liable to affect the fundamental rights of the defendant given that samples of organic matter needed to be taken from the defendant to be able to present such evidence. This could jeopardise the physical well-being of the individual in an irreparable way.

II. Having determined the existence of such a conflict of Resolutions, the First Chamber of the Supreme Court undertook to consider whether the admission and presentation of the expert genetic evidence accepted by a First Instance Judge could bring irreparable consequences potentially affecting the fundamental rights of the individual.

The First Chamber established that unrestricted authorisation to take DNA samples from an individual could be considered an invasion of the individual's privacy, as it could potentially bring to light other genetic factors unrelated to a paternity lawsuit registered in the reports of the experts and held in records. Anyone consulting such files might become aware of such information, to a certain degree undermining the right to privacy, freedom and physical well-being.

Likewise the First Chamber decided that admitting and ordering the presentation of expert genetic evidence, with its inherent implications, does affect the individual in question even though it might appear a routine process. The fact is that in order to take a sample of organic matter required for purposes of presenting evidence, the individual's presence is required in a given place at a given time to have the respective tests done and laboratory tests and samples taken. This affects the individual irreparably for even if the outcome of the related lawsuit should favor the individual, the organic tissue removed to present the evidence cannot be recovered. The legally transcendent fact is that the right to privacy, freedom, and physical well-being cannot be redressed by merely obtaining a favorable outcome in the related proceedings.

The prevailing ruling issued by the First Chamber was that, whenever an ordinary civil lawsuit involves paternity issues, a court order must be issued admitting the presentation of expert evidence aimed at identifying the genetic imprint and accrediting whether a parental link can be established by inbreeding. Such an act must be considered an irreparable act that potentially violates the fundamental rights of an individual. Thus, such a court order can be submitted to an immediate constitutional analysis through indirect relief proceedings, in terms of Article 107.III.b of the Federal Constitution, and Article 114.IV of the Amparo Law.

The Court's ruling was accounted for by the fact the expert evidence in question is special and its presentation requires the taking of organic tissue and blood samples to obtain a scientifically supported DNA match; i.e., a genetic imprint. This allows not only the existence of a parental tie to be established but also other genetic characteristics inherent to any individual who undergoes this test. Such information may be totally unrelated to the lawsuit in question and could potentially reveal another type of hereditary genetic condition in the individual tested – but such information is private.

#### *Languages:*

Spanish.



## Morocco

### Constitutional Council

#### Important decisions

*Identification:* MAR-2010-2-001

**a)** Morocco / **b)** Constitutional Council / **c)** / **d)** 21.03.2005 / **e)** 606/05 CC / **f)** / **g)** *Bulletin officiel* (in Arabic), no. 5308, 14.04.2005; *Revue du Conseil constitutionnel*, 7/2007 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

4.5.2.2 Institutions – Legislative bodies – Powers – **Powers of enquiry.**

4.5.7 Institutions – Legislative bodies – **Relations with the executive bodies.**

4.10 Institutions – **Public finances.**

4.10.5 Institutions – Public finances – **Central bank.**

*Keywords of the alphabetical index:*

Monetary policy / Parliament, Standing Committee on Finance / Central bank, hearing of the governor.

*Headnotes:*

The central bank of Morocco is a public entity which, in view of its specific characteristics, cannot be included in the category of public institutions. Its governor is not an “assistant” within the meaning of Article 42 of the Constitution and can therefore be heard directly by parliamentary committees at their request. Under Article 66 of the Constitution, the setting of monetary policy is the responsibility of the Cabinet chaired by the King.

*Summary:*

I. The application from the Prime Minister from which this decision originated asks the Constitutional Council to declare unconstitutional the provisions of Article 58 of the Law establishing the statutes of Bank Al-Maghrib (central bank of Morocco) relating to the hearing of its governor “by standing committees on finance, either at their request or at the governor's request, on matters relating to monetary policy and the activity of public credit institutions and the like”.

II. The Constitutional Council examined the application submitted to it first from the angle of the procedure leading to the hearing of the governor by the committees in question, then from the angle of the purpose of the hearing.

On the first point, the Constitutional Council examined first the case of a hearing at the request of the governor himself, then that of a hearing at the request of a committee.

With regard to the first case, the Constitutional Council considers that, in establishing a link between the right of access to committee meetings and the right to participate in the proceedings of Parliament, the Constitution does not permit the assertion that the governor has access, in that capacity, to the sittings of both Houses of Parliament and to the meetings of their standing committees. Consequently, he cannot be heard by those committees at his own request.

With regard to the second case, the Constitutional Council – arguing that no ruling can be made as to the constitutionality of the hearing of the governor at the request of committees, except on matters relating to the missions and statutes of the central bank of Morocco, and concluding on that basis that it is a public entity which, in view of its specific characteristics, cannot be included in the category of public institutions – asserts that its governor is not an “assistant” within the meaning of Article 42 of the Constitution and can therefore be heard directly by committees at their request, and points to the requirement to notify the Minister of Finance, who is entitled to attend such hearings.

On the second point, the Constitutional Council criticises the expression “matters relating to monetary policy”, stated as the purpose of the hearing, insofar as it is likely to be interpreted as referring to the setting of monetary policy, which, under Article 66 of the Constitution, is the responsibility of the Cabinet chaired by the King.

#### *Languages:*

Arabic, French (translation by the Constitutional Council).



#### *Identification: MAR-2010-2-002*

**a)** Morocco / **b)** Constitutional Council / **c)** / **d)** 23.09.2007 / **e)** 659/07 CC / **f)** Declaration of assets by members of the Constitutional Council / **g)** *Bulletin officiel* (in Arabic), no. 5571, 22.10.2007; *Revue du Conseil constitutionnel*, 8/2008 / **h)** CODICES (French).

#### *Keywords of the systematic thesaurus:*

1.1.3 Constitutional Justice – Constitutional jurisdiction – **Status of the members of the court.**  
5.2 Fundamental Rights – **Equality.**

#### *Keywords of the alphabetical index:*

Assets, declaration / Constitutional Council, member, assets, declaration, refusal / Constitutional Council, member, loss of office.

#### *Headnotes:*

The penalty for failure of a member of the Constitutional Council to declare his or her assets must not entail the loss of his or her office. That penalty should be accompanied by as many guarantees as possible, giving rise to a fresh opportunity for the member concerned to declare his or her assets.

Further, where a member of the Constitutional Council has failed to comply with the requirement to declare his or her assets, the imposition of two disproportionate penalties which differ according to whether the offence was committed at the time of appointment, during the period of office or on its expiry, despite the fact that the same offence is involved, constitutes a violation of the constitutional principle of equality.

#### *Summary:*

I. The Prime Minister lodged an application with the Constitutional Council asking it to review the constitutionality of Organic Law no. 49-06 on the declaration of assets by members of the Constitutional Council, in accordance with the last paragraph of Article 58 and the second paragraph of Article 81 of the Constitution.

The law in question contains four articles dealing successively with:

- the introduction in Title II entitled "Operation of the Constitutional Council" of a Chapter Vbis entitled "Loss of parliamentary status for failure to declare assets";
- the body responsible for receiving declarations of assets;
- the resignation of members of the Constitutional Council who refuse to submit a declaration of assets;
- and transitional provisions relating to the schedule for enforcement of the law in question.

II. The Constitutional Council declared certain provisions of the law unconstitutional, arguing as follows:

The legislature has opted for the most severe penalty against members of the Constitutional Court who fail to declare their assets, namely loss of office, such penalty being motivated by the need to make politics more ethical in the interests of the nation and the proper functioning of its institutions, the responsibility for its imposition lying with the Constitutional Council. Having regard to the fact that members of the Constitutional Council belong to an institution responsible for regulating the operation of public authorities, and taking into account the importance of this body's decisions in the constitutional system and the legal effects flowing from them under Article 81 of the Constitution, that penalty should be accompanied, through the procedure employed, the measures adopted and the nature of the institution empowered to decide the fate of members of the Constitutional Council, by as many guarantees as possible, including provision, during the referral stage and before the decision is taken to dismiss the member concerned, for a further opportunity to submit the declaration of assets, in order to make the decision in question as safe as possible.

The fact that when a case of failure by a member of the Constitutional Council to respond to a warning is referred to that body, it is not empowered to receive that member's declaration within an additional period of time fixed by it, ultimately limits the Constitutional Council to merely establishing compliance with time-limits set before the case was referred to it, which infringes the autonomy of its decision-making.

Where a member of the Constitutional Council fails to comply with the requirement to declare his or her assets, the imposition of two disproportionate penalties which differ according to whether the offence was committed at the time of appointment, during the period of office or on its expiry, despite the

fact that the same offence is involved, constitutes an infringement of the constitutional principle of equality.

#### *Languages:*

Arabic, French (translation by the Constitutional Council).



#### *Identification:* MAR-2010-2-003

**a)** Morocco / **b)** Constitutional Council / **c)** / **d)** 23.09.2007 / **e)** 660/07 CC / **f)** Declaration of assets by members of the House of Representatives / **g)** *Bulletin officiel* (in Arabic), no. 5571, 22.10.2007; *Revue du Conseil constitutionnel*, 8/2008 / **h)** CODICES (French).

#### *Keywords of the systematic thesaurus:*

4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**  
5.2 Fundamental Rights – **Equality.**

#### *Keywords of the alphabetical index:*

Assets, declaration / Parliament, member, assets, declaration, refusal / Parliament, member, loss of mandate.

#### *Headnotes:*

The penalty for failure of a member of the House of Representatives to declare his or her assets must not entail the loss of his or her parliamentary mandate. The penalty imposed on him or her should be accompanied by as many guarantees as possible in order to give the member concerned a further opportunity to declare his or her assets.

Further, where a member of the House of Representatives has infringed the obligation to declare his or her assets, the imposition of two disproportionate penalties which differ according to whether the offence was committed at the time of appointment, during the parliamentary mandate or on its expiry, despite the fact that the same offence is involved, constitutes a violation of the constitutional principle of equality.

### *Summary:*

I. The application from the Prime Minister in which this decision originated asks the Constitutional Council to review the constitutionality of Organic Law no. 50-06 supplementing Organic Law no. 31-97 on the House of Representatives.

The law in question contains two articles. The first article deals successively with:

- the "declaration of assets" as a new section of the law in question;
- the body set up within the Court of Auditors with responsibility for receiving the declarations of assets of members of the House;
- procedure relating to time-limits, the assets which must be declared, the operation of the body in question, the measures taken against members who fail to declare their assets and the consequent loss of their status as members of the House of Representatives.

The second article contains the transitional provisions setting out the rules for implementing the new provisions introduced into the Organic Law on the Chamber of Representatives.

II. In reviewing this law, the Constitutional Council declared some of its provisions unconstitutional, arguing as follows:

The legislature has opted for the harshest possible penalty against representatives who fail to declare their assets, namely loss of their parliamentary mandate, such penalty being motivated, in the general interest, by the need to make politics more ethical so as to ensure the proper functioning of institutions, the responsibility for its imposition lying with the Constitutional Council. In the case of persons deriving their mandate from the Nation in accordance with Article 36 of the Constitution, that penalty should be accompanied, through the procedure employed, the measures adopted and the nature of the institution empowered to decide the fate of members of the House of Representatives, by the most reliable guarantees, including provision, during the referral stage and prior to automatic dismissal of the representative concerned, for a further opportunity to submit his or her declaration of assets, in order to dispel as far as possible any doubts concerning the decision in question.

The fact that when a case of failure by a representative to respond to a warning concerning his or her declaration of assets is referred to the Constitutional Council, it is not empowered to receive his or her declaration within an additional period of

time fixed by it means that it will merely limit itself to establishing compliance with time-limits set prior to the referral, which will therefore infringe the autonomy of its decision-making.

Where a member of the House of Representatives fails to comply with the requirement to declare his or her assets, the imposition of two disproportionate penalties which differ according to whether the offence was committed at the time of appointment, during the parliamentary mandate or on its expiry, despite the fact that the same offence is involved, constitutes an infringement of the constitutional principle of equality.

It is not unconstitutional for members of the House of Representatives – including those holding representative status in several capacities rendering them subject to a system of declaration of assets, and those who made a declaration of assets in the past under a different declaration system prior to acquiring the status of parliamentarian – to limit themselves, under a transitional provision, to submitting their declaration in accordance with the present law.

### *Languages:*

Arabic, French (translation by the Constitutional Council).



# Netherlands

## Council of State

---

### Important decisions

*Identification:* NED-2010-2-004

**a)** Netherlands / **b)** Council of State / **c)** Third Chamber (appeal) / **d)** 14.07.2010 / **e)** 200906181/1/H1 / **f)** X in appeal against the judgment by the Dordrecht District Court in the case of X v. mayor and aldermen of Giessenlanden / **g)** LJN BN1135; *Gemeentestem* 2010, 77 / **h)** CODICES (Dutch).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

5.3.20 Fundamental Rights – Civil and political rights – **Freedom of worship.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

*Keywords of the alphabetical index:*

Penalty / Planning regulations / Religion.

*Headnotes:*

The order to remove the words ‘Jesus saves’, written in large white letters on the roof of a house, was held to be lawful, since neither the order itself, nor the policy document on which it was based, contravened any of the fundamental rights invoked.

*Summary:*

I. The applicant had written ‘Jesus saves’ in very large white letters (in roof tiles) on the roof of his house. The mayor and aldermen of Giessenlanden imposed upon the applicant an order to remove the white roof tiles and an order for incremental penalty payments. The applicant objected to the decision, but the mayor and aldermen dismissed his objections. The applicant then applied for a preliminary injunction. The District Court found for the applicant, as the mayor and aldermen had not made it sufficiently clear how their decision had been made in

the light of the policy document on planning regulations for the location and external appearance of buildings (hereinafter, the “policy document”). The applicant appealed to the Administrative Jurisdiction Division of the Council of State, arguing *inter alia* that both the order and the policy document on which it was based, contravened his rights to freedom of religion and freedom of expression under the European Convention on Human Rights and the Constitution.

II. The Administrative Jurisdiction Division of the Council of State held, as the European Court of Human Rights always understands the term ‘law’ in its ‘substantive’ sense, that ‘law’ in the sense of Article 10 ECHR did include the policy document which had a basis in domestic law. The Administrative Jurisdiction Division of the Council of State recalled that the exercise of freedom of expression may be subject to such conditions as are necessary in a democratic society for the protection of the rights of others and for the prevention of disorder. The conditions set by the policy document – reasonable requirements regarding the external appearance of buildings – qualified under both headings.

For the same reasons, the order to remove the large white letters from the roof was not considered to be an infringement of the applicant’s rights under Article 10 ECHR either. The limitation of the applicant’s rights did not relate to the content of the text, but merely to the way in which the applicant had expressed himself. He could choose other means of expression, for instance by using a smaller type face in a less striking colour or by exposing the text on other parts of his property instead of the roof.

Since the policy document did not impose a general prohibition or require prior permission to publish thoughts or opinions, there was no violation of Article 7.1 of the Constitution.

The order itself did not violate Article 7.3 of the Constitution either. The Administrative Jurisdiction Division of the Council of State held that, if the means of expression chosen by the applicant – exposing a text on his property – did have some independent meaning, the order did not rule out the possibility for him to use those means.

The appellant had claimed that the District Court had wrongly failed to address his claim under Article 9 ECHR in relation to the policy document.

The applicant’s argument based on Article 9 ECHR with regard to the order itself also failed. The Administrative Jurisdiction Division of the Council of



State held, under reference to *inter alia* its prior case-law, that planning law may lawfully limit the applicant's rights under Article 9 ECHR. The circumstances of the case which had led to the opinion that the exercise of the freedoms under Article 10 ECHR had been lawfully limited, also applied to the claim under Article 9 ECHR.

The Administrative Jurisdiction Division of the Council of State held that Article 6 of the Constitution did not provide for a more far-reaching protection of the appellant's freedom of religion than Article 9 ECHR. This provision did not stand in the way of a general regulation concerning the protection of public order that does not touch upon the content of religious expression, provided that its applications in concrete cases do not render the use of the means of expression concerned fully impossible. For the same reasons as expressed in its opinion on the claim based on Article 7.3 of the Constitution (see above), the Administrative Jurisdiction Division of the Council of State held that the use of the means of expression chosen by the applicant was not made totally impossible.

#### Cross-references:

- Administrative Jurisdiction Division of the Council of State, 21.05.2008, no. 200706809, CODICES, *Bulletin* 2008/2 [NED-2008-2-005].

#### Languages:

Dutch.



## Norway Supreme Court

### Important decisions

*Identification:* NOR-2010-2-002

**a)** Norway / **b)** Supreme Court / **c)** Plenary / **d)** 12.02.2010 / **e)** 2010-00258P / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2010, 143 / **h)** CODICES (Norwegian).

#### *Keywords of the systematic thesaurus:*

5.3.38.4 Fundamental Rights – Civil and political rights – Non-retrospective effect of law – **Taxation law.**

5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation.**

#### *Keywords of the alphabetical index:*

Public policy reason.

#### *Headnotes:*

Unless there are strong public policy reasons legislation should not be given retroactive effect.

#### *Summary:*

I. Under the tonnage tax scheme introduced in 1996, shipping income was “exempt from tax”, but untaxed profits were taxed upon distribution to shareholders or exit of the company from the special tax system.

II. A majority of the Supreme Court (by 6 votes to 5) held that the tax assessment of the shipping companies must be set aside because the transitional rules in the Act of 14 December 2007 no. 107 Part X violated the prohibition against retroactive legislation in Article 97 of the Constitution. The majority emphasised that there were no strong public policy reasons why the legislation should be given retroactive effect and it was therefore unnecessary to consider the provisions on protection of private property in Article 1 Protocol 1 ECHR.

*Cross-references:*

- HR-2010-258-P, Cases nos. 2009/1575 and 2009/1663, civil appeal against judgment.

*Languages:*

Norwegian, English (translation by the Court).



## Poland

### Constitutional Tribunal

---

#### Statistical data

1 May 2010 – 31 August 2010

Number of decisions taken:

Judgments (decisions on the merits): 16

- Rulings:
  - in 9 judgments the Tribunal found some or all challenged provisions to be contrary to the Constitution (or other act of higher rank)
  - in 7 judgments the Tribunal did not find the challenged provisions to be contrary to the Constitution (or other act of higher rank)
- Initiators of proceedings:
  - 5 judgments were issued at the request of courts – question of legal procedure
  - 4 judgments were issued at the request of private individuals (physical or natural persons) – the constitutional complaint procedure
  - 1 judgment was issued at the request of the Commissioner for Citizens' Rights (i.e. Ombudsman)
  - 2 judgments were issued upon the request of legal entities (an R&D unit of the Ministry of Economy and a general partnership) – the constitutional complaint procedure
  - 3 judgments were issued upon the request of Municipal Councils
  - 1 judgment was issued at the request of the President of the Republic – preliminary review procedure
- Other:
  - 2 judgments were issued by the Tribunal in plenary session
  - 3 judgments were issued with dissenting opinions.

## Important decisions

*Identification:* POL-2010-2-004

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.02.2010 / **e)** K 6/09 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2010, no. 36, item 204; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2010, no. 2A, item 15 / **h)** CODICES (Polish, English).

*Keywords of the systematic thesaurus:*

3.17 General Principles – **Weighing of interests.**

4.6.9.3 Institutions – Executive bodies – The civil service – **Remuneration.**

4.11.3 Institutions – Armed forces, police forces and secret services – **Secret services.**

5.1.1.4.4 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Military personnel.**

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security.**

5.2.2.13 Fundamental Rights – Equality – Criteria of distinction – **Differentiation *ratione temporis*.**

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations.**

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security.**

5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension.**

5.4.18 Fundamental Rights – Economic, social and cultural rights – **Right to a sufficient standard of living.**

*Keywords of the alphabetical index:*

Communist regime / Pension, reduction.

*Headnotes:*

Guarantees of impunity for systemic violations of human rights and freedoms set out in the Universal Declaration of Human Rights, negotiated by the representatives of bloodlessly falling dictatorships, are deprived of the guarantee of constitutional protection.

The social security system for professional soldiers and that pertaining to functionaries of uniformed services constitute a special kind of privilege. The privileged old age pension rights acquired by the addressees of the challenged provisions were acquired unjustly. The challenged provisions do not contain criminal sanctions or sanctions of a repressive character.

The lapse of time since the gaining of sovereignty by the Polish State in 1989 is significant but may not be a decisive criterion in the assessment of the constitutionality of the regulations adopted by the legislator in order to settle accounts with the former functionaries of the communist regime.

The Military Council in Poland had the attributes known in doctrinal literature as those of a military junta.

The essence of the communist regime was determined by the following features:

1. Monopolist power of the Communist Party over every domain of public life, including the political subordination of authorities of the legislative, executive and judicial power;
2. Nationalisation without compensation of all private property, or at least of all large and medium sized property in agriculture, industry and finance;
3. Replacement of market economy with central planning over all domains of economic life;
4. Economic dependence of citizens on the state;
5. Rigorously enforced prohibition of the existence of parties other than the communist party, or a possible admission of groupings intended to constitute the so-called political transmission of the power to certain milieus;
6. Lack of freedom of expression and other fundamental rights and freedoms;
7. In the case of a conflict with the regime, the lack of legal means to assert individual and political rights and freedoms.

*Summary:*

I. A group of Members of Parliament requested a constitutional review of the whole Act of 23 January 2009 amending the Act on Old Age Pensions of Professional Soldiers and their Families and the Act on Old Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anti-corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (*Journal of Laws – Dz. U.* of 2009, no. 24, item 145; hereinafter, the “Act”) in the light of Articles 2, 10, 18, 30, 31.3, 32, 45 and 67.1 of the Constitution.

The above legislative provisions brought about reductions in pension benefits for professional soldiers belonging to the Military Council of National Salvation and for functionaries of several uniformed formations, including the secret services of the People’s Republic of Poland. The reduction consists

of adopting a basis of assessment of the pension in the amount of 0.7% (instead of 2.6%) for every year of service in the entities described above between 1944 and 1990.

II. The applicants suggested that the Act infringed the principle of acquired rights, as well as the principles of citizens' trust in the state and that of social justice, enshrined in Article 2 of the Constitution. In their view, the Act was also at variance with Article 32, as the legislator treated all former functionaries of state security authorities equally, irrespective of whether or not they had undergone a verification process and whether they retired before or after 1990. The applicants also contended that the amendment did not have a general and abstract character, since it applied to persons who might be listed by name. Concepts such as "crime", "responsibility" and "illegality" are derived from criminal law and suggest that the amendment has such a character.

According to the Tribunal, the axiological foundation of the legislation aimed at settling accounts with the communist regime in Poland from 1944 to 1990 (by democratic legislators and in accordance with the principles of a democratic state ruled by law) is in particular the preamble to the Constitution, where reference is made to "the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland".

The rationale behind the verification proceedings was not the passing of moral judgment or the rendering of opinions equivalent to a court decision on the innocence of former functionaries of state security authorities of the People's Republic of Poland. Rather, their purpose was to attest the usefulness of former functionaries of the dissolved State Security Service for service in the new Office for State Protection. The State Protection Office was not a legal or ideological continuation of the communist State Security Service.

Contrary to the assertions of the applicants, the social security system of professional soldiers and that pertaining to functionaries of the uniformed services constitute a special kind of privilege. These privileges had been acquired unfairly.

The coefficients applied to the basis of assessment of the pension (e.g. 0.7%, 1.3%, 2.6%, etc.) within the universal social insurance system and within the special systems of social insurance for the uniformed services are not comparable due to systemic differences of both systems.

There might have been an infringement of the essence of the right to social security had the legislator lowered the benefits below the social minimum or removed pension rights. The average reduced pension of a former functionary is still higher by 58% than an average pension under the universal social insurance system. Consequently, the challenged provisions are in line with Article 30 of the Constitution.

The challenged reduction in pension benefits does not infringe Article 32 of the Constitution, as the legislator treated officials of the security authorities of the People's Republic of Poland equally, with the sole exception of those able to prove that prior to 1999 they played an active role in the struggle for Poland's independence.

According to the Tribunal, the applicants had formed an inaccurate understanding of both the general and the abstract elements of the legal norms. They also contradicted themselves, in that having made the allegation of the lack of generality and abstractness of the norms; they claim that "giving the provisions of the statute a general and abstract character additionally prejudices the establishment of collective responsibility".

The challenged provisions did not contain criminal sanctions, or even sanctions of repressive character; they do not determine the guilt of the addressees of the norms expressed in them. Consequently, Article 42 is not an adequate higher-level norm for review of the challenged provisions.

The Tribunal issued this decision in a plenary session. Five dissenting opinions were raised. The closed hearings were reopened and postponed indefinitely. Judgment was handed down on 10 March 2010.

#### Cross-references:

##### Decisions of the Constitutional Tribunal:

- Decision K 7/90 of 22.08.1990, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1990, item 5;
- Procedural decision S 6/91 of 25.09.1991, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1991, item 34;
- Decision K 14/91 of 11.02.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 7; *Special Bulletin Leading Cases 1* [POL-1992-S-001];
- Decision K 3/91 of 25.02.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992, item 1;

- 
- Decision K 15/93 of 15.02.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 4; *Bulletin* 1994/1 [POL-1994-1-002];
  - Decision K 1/94 of 24.05.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 10; *Bulletin* 1994/2 [POL-1994-2-008];
  - Decision K 6/94 of 21.11.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 39; *Bulletin* 1994/3 [POL-1994-3-019];
  - Procedural decision U 5/94 of 06.12.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, item 41; *Bulletin* 1994/3 [POL-1994-3-021];
  - Decision K 13/94 of 14.03.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 6;
  - Decision K 19/95 of 22.11.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, item 35; *Bulletin* 1995/3 [POL-1995-3-017];
  - Decision U 3/96 of 15.07.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 4, item 31; *Bulletin* 1996/2 [POL-1996-2-012];
  - Decision K 25/95 of 03.12.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 6, item 52; *Bulletin* 1996/3 [POL-1996-3-018];
  - Decision K 19/96 of 24.02.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 1, item 6; *Bulletin* 1997/1 [POL-1997-1-005];
  - Decision K 21/95 of 25.02.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, no. 1, item 7; *Bulletin* 1997/1 [POL-1997-1-006];
  - Decision K 25/97 of 22.09.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, nos. 3-4, item 35; *Bulletin* 1997/3 [POL-1997-3-017];
  - Decision K 25/96 of 23.09.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, nos. 3-4, item 36; *Bulletin* 1997/3 [POL-1997-3-018];
  - Judgment K 12/98 of 03.11.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 6, item 98;
  - Judgment SK 7/98 of 23.11.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 7, item 114; *Bulletin* 1998/3 [POL-1998-3-020];
  - Procedural decision Ts 154/98 of 17.02.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 2, item 34;
  - Judgment K 8/99 of 14.04.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 3, item 41; *Bulletin* 1999/1 [POL-1999-1-009];
  - Judgment K 3/99 of 28.04.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 4, item 73; *Bulletin* 1999/2 [POL-1999-2-012];
  - Judgment K 34/98 of 02.06.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 94; *Bulletin* 1999/2 [POL-1999-2-019];
  - Judgment K 5/99 of 22.06.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 100;
  - Judgment P 2/99 of 06.07.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 103; *Bulletin* 1999/2 [POL-1999-2-024];
  - Judgment K 11/99 of 15.09.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 6, item 116;
  - Procedural decision U 7/99 of 14.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 170;
  - Judgment K 4/99 of 20.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 165; *Bulletin* 2000/1 [POL-2000-1-003];
  - Judgment K 22/99 of 21.12.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 7, item 166;
  - Judgment SK 22/99 of 08.05.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 4, item 107;
  - Judgment SK 21/99 of 10.07.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 144;
  - Judgment K 9/00 of 04.12.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 8, item 294;
  - Judgment K 8/98 of 12.04.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 3, item 87;
  - Judgment K 27/00 of 07.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 29;
  - Judgment SK 14/00 of 19.02.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 2, item 31;
  - Judgment K 11/00 of 04.04.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 3, item 54;
  - Judgment K 33/00 of 30.10.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 7, item 217;
  - Judgment SK 11/01 of 06.02.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 1A, item 2;
-

- 
- Judgment SK 23/01 of 16.04.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 26; *Special Bulletin Human Rights Limitation* [POL-2002-H-001];
  - Judgment K 6/02 of 22.05.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 33; *Bulletin* 2002/3 [POL-2002-3-028];
  - Judgment P 12/01 of 04.07.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 50;
  - Judgment SK 41/01 of 08.07.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 4A, item 51;
  - Judgment K 41/02 of 20.11.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 6A, item 83; *Bulletin* 2003/1 [POL-2003-1-006];
  - Judgment SK 42/01 of 14.07.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 6A, item 63;
  - Judgment K 32/02 of 17.11.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 9A, item 93;
  - Judgment P 21/02 of 18.02.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 2A, item 9; *Special Bulletin Human Rights Limitation* [POL-2004-H-001]; *Bulletin* 2004/2 [POL-2004-2-012];
  - Judgment K 45/02 of 20.04.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 4A, item 30;
  - Judgment SK 26/02 of 31.03.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 3A, item 29;
  - Judgment K 42/02 of 20.04.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 4A, item 38;
  - Judgment K 6/04 of 17.10.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 9A, item 100;
  - Judgment K 23/03 of 31.01.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 1A, item 8;
  - Judgment SK 45/04 of 07.02.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 2A, item 15;
  - Judgment K 4/06 of 23.02.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 3A, item 32; *Bulletin* 2006/1 [POL-2006-1-006];
  - Judgment SK 30/04 of 10.04.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 4A, item 42;
  - Judgment K 33/05 of 17.05.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 5A, item 57;
  - Judgment U 4/06 of 22.09.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 8A, item 109;
  - Judgment P 10/06 of 30.10.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 9A, item 128; *Bulletin* 2007/2 [POL-2007-2-003];
  - Judgment SK 15/06 of 11.12.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 11A, item 170;
  - Judgment SK 54/06 of 06.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 23;
  - Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 26; *Bulletin* 2008/1 [POL-2008-1-001];
  - Judgment K 2/07 of 11.05.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 5A, item 48; *Bulletin* 2007/3 [POL-2007-3-005];
  - Judgment K 20/07 of 08.10.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 9A, item 102;
  - Procedural decision P 32/07 of 06.11.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 10A, item 131;
  - Judgment SK 82/06 of 12.02.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 1A, item 3;
  - Judgment SK 96/06 of 01.04.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 3A, item 40;
  - Judgment P 38/06 of 29.04.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 3A, item 46;
  - Judgment K 35/06 of 02.09.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 7A, item 120;
  - Judgment K 64/07 of 15.07.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 7A, item 110;
  - Judgment P 46/07 of 22.09.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 8A, item 126;
  - Judgment U 10/07 of 02.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 11A, item 163.
- Decisions of the Federal Constitutional Court of Germany:
- Judgments 1 BvL 11/94, 1 BvL 33/95, 1 BvR 1560/97 of 28.04.1999; BVerfGE 100, 138;
  - Judgments 1 BvL 22/95, 1 BvL 34/95 of 28.04.1999; BVerfGE 100, 59.
-

## Decisions of the European Court of Human Rights:

- Judgment in the case of *Gillow v. the United Kingdom* of 24.11.1986, application no. 9063/80;
- Judgment in the case of *Gaygusuz v. Austria* of 16.09.1996, application no. 17371/90; *Bulletin* 1996/3 [ECH-1996-3-012];
- Decision in the case of *Domalewski v. Poland* of 15.06.1999, application no. 34610/97;
- Judgment in the case of *Sidabras and Dziautas v. Lithuania* of 27.07.2004, applications nos. 55480/00, 59330/00;
- Judgment in the case of *Žičkus v. Lithuania* of 07.04.2009, application no. 26652/02;
- Judgment in the case of *Rasmussen v. Poland* of 28.04.2009, application no. 38886/05.

## Decisions of the European Commission of Human Rights:

- Decision in the case of *Styk v. Poland* of 16.04.1998, application no. 28356/95;
- Decision in the case of *Szumilas v. Poland* of 01.07.1998, application no. 35187/97;
- Decision in the case of *Bieńkowski v. Poland* of 09.09.1998, application no. 33889/96.

## Languages:

Polish, English (translation by the Tribunal).



## Identification: POL-2010-2-005

a) Poland / b) Constitutional Tribunal / c) / d) 15.07.2010 / e) K 63/07 / f) / g) *Monitor Polski* (Official Gazette), 2010, no. 137, item 925; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2010, no. 6A, item 1 / h) CODICES (Polish).

## Keywords of the systematic thesaurus:

3.5 General Principles – **Social State**.  
 4.10 Institutions – **Public finances**.  
 4.10.7.1 Institutions – Public finances – Taxation – **Principles**.  
 5.1.3 Fundamental Rights – General questions – **Positive obligation of the state**.

5.1.4 Fundamental Rights – General questions – **Limits and restrictions**.

5.2 Fundamental Rights – **Equality**.

5.2.1.1 Fundamental Rights – Equality – Scope of application – **Public burdens**.

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.

5.3.39.3 Fundamental Rights – Civil and political rights – Right to property – **Other limitations**.

5.3.42 Fundamental Rights – Civil and political rights – **Rights in respect of taxation**.

5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession**.

5.4.14 Fundamental Rights – Economic, social and cultural rights – **Right to social security**.

5.4.16 Fundamental Rights – Economic, social and cultural rights – **Right to a pension**.

## Keywords of the alphabetical index:

Pension, right / Pension, determination / Discrimination / Gender, difference, biological / Contract, employment, cessation.

## Headnotes:

Differences in the ages at which men and women are entitled to start receiving their pensions result from an unequal division of maternity chores and educational responsibilities in the family and a simultaneous burdening of women both with professional work and with family duties. The above findings substantiate the assertion that the transformations bringing about true equality of both sexes in society have not yet been accomplished. Social differences still exist today, though to a lesser extent, due to the fact that women assume roles within the traditional model of a family. The situation under discussion is a dynamic one; society is changing.

## Summary:

I. The Ombudsman lodged an application for the constitutional review of Article 24.1 of the Act of 17 December 1998 on Old Age Pensions and Disability Pensions from the Social Insurance Fund (*Journal of Laws* – Dz. U. of 2004 no. 39, item 353; hereinafter, the “Act”) in the light of Articles 32 and 33 of the Constitution. The challenged provision sets a universal pensionable age for insured persons born after 31 December 1948 of at least 60 years of age for women and at least 65 years of age for men.

II. The Ombudsman pointed out that under the initial pension reforms of 1998; both men and women were to start receiving their pensions from the age of 62. Under the current system, there is a strict correlation of the amount of pension benefits, cumulative contributions and the forecast length of life after reaching the pensionable age.

The Ombudsman also observed that even in situations of the same initial contribution capital, a differentiation in the pensionable age will lead to a significant differentiation in the amount of pension that is paid out.

According to the Ombudsman, it is impossible to establish that the biological and social differences between women and men are of relevance and still in direct and necessary connection with the legal differentiation in pensionable age regulation.

The applicant also observed that if women were to continue to start receiving their pensions at 60, this would deprive them of the possibility of continuing professional activity on a par with men, once they have reached pensionable age, and would also deprive them of access to professional training.

The Constitutional Tribunal stressed that the allegations of the Ombudsman did not concern the differentiation in the pensionable age, resulting from the challenged provision of the Act, but rather the consequences of this differentiation, resulting from other provisions of this Act and other legislation, which are not under challenge before the Constitutional Tribunal.

The Constitutional Tribunal quoted several EU law regulations regarding the admissibility of setting different ages for men and women to start receiving their pensions, along with selected case-law of the European Court of Justice, provisions of several international law regulations which are binding in Poland, and selected case-law of the European Court of Human Rights.

The prohibition of discrimination resulting from Article 32.2 of the Constitution is not exactly the same as a prohibition on differentiating situations of legal subjects. It is instead a prohibition of unjustified different treatment of similar situations of legal subjects, in the process of enacting and applying law. Also, on the basis of Article 33 of the Constitution, equality in enacting law and equality in applying it should be distinguished. The presumption of the existence of equal rights and their equal application independently of gender is well established in constitutional case-law.

The Constitutional Tribunal cited two recent resolutions of the Polish Supreme Court regarding the possibility of terminating an employment contract for the sole reason of having reached pensionable age, to which the applicant referred. Currently, due to Poland's accession to the European Union and the obligation of every Polish court to interpret national law in accordance with EU law, terminating a labour relationship due to the fact that a woman has reached pensionable age constitutes sex discrimination.

Concerning the amount of pension benefits in the system introduced in 1998, the Constitutional Tribunal pointed out that benefits under that system would only be paid out from 1 January 2014 and that the pension-remuneration replacement ratio was not pre-determined. According to the Constitutional Tribunal, raising or equalising the pensionable ages of men and women will not level the differences in the pension benefits they receive, as the average remuneration for a woman is 82% of that received by a man.

Previous case-law of the Constitutional Tribunal has allowed the treatment of the differentiated pensionable age as a manifestation of compensatory privilege. It should be stressed, however, that in the present case the universal pensionable age in the new pension system is subject to constitutional review for the first time.

Despite the changes in the perception of socio-cultural male and female roles, the situation of both sexes still differs, usually to the detriment of women. Calculations concerning the economic dimension of work carried out in households suggest that the monthly value per capita of the so-called unpaid labour of women is comparable to the amount of the average monthly pay in the national economy. These findings substantiate the assertion that the transformations aiming at making both sexes equal in society have not yet been accomplished. Social differences still exist today, though to a lesser extent, due to the fact that women assume roles within the traditional model of a family.

Taking into account the mechanism aiming at levelling the negative aspects of the differentiation of the pensionable age, the Constitutional Tribunal stated that the value substantiating the departure from the principle of equality in this case is proportional to the gravity of the value substantiating equal treatment of similar subjects.

The Constitutional Tribunal noted that the legislator enjoys a high level of discretion in shaping legal solutions concerning personal rights of a social character. The Constitutional Tribunal does not have the competence to assess the soundness of such



regulations. However, the situation under discussion is a dynamic one. The social and biological differences between the sexes will become less supportive of differentiation along gender lines in terms of pensionable age.

In this context, the Constitutional Tribunal resolved to address a signalling procedural decision under Article 4.2 of the Act on the Constitutional Tribunal, on the purposefulness of taking legislative action aimed at a gradual levelling of the pensionable age of women and men.

The Constitutional Tribunal issued this decision in a plenary session (15 judges). Three dissenting opinions were made.

#### Cross-references:

##### Decisions of the Constitutional Tribunal:

- Decision P 2/87 of 03.03.1987, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1987, item 2;
- Decision U 7/87 of 09.03.1988, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1988, item 1;
- Decision Kw 5/91 of 24.09.1991, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1991, item 5;
- Procedural decision Tw 7/94 of 07.09.1994 (unpublished);
- Decision K 15/97 of 29.09.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, nos. 3-4, item 37; *Special Bulletin Leading Cases 1* [POL-1997-S-002]; *Bulletin* 1997/3 [POL-1997-3-020];
- Judgment K 8/97 of 16.12.1997, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1997, nos. 5-6, item 70;
- Judgment K 24/97 of 31.03.1998, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1998, no. 2, item 13; *Bulletin* 1998/1 [POL-1998-1-007];
- Judgment SK 4/98 of 24.02.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 2, item 24;
- Judgment K 5/99 of 22.06.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 5, item 8;
- Judgment K 6/98 of 21.09.1999, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1999, no. 6, item 117; *Bulletin* 1999/3 [POL-1999-3-026];
- Judgment K 18/99 of 04.01.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 1, item 1;
- Judgment K 27/99 of 28.03.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 2, item 62; *Bulletin* 2000/2 [POL-2000-2-010];
- Judgment SK 22/99 of 08.05.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 4, item 107;
- Judgment K 15/99 of 13.06.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 137;
- Judgment K 1/00 of 12.09.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 6, item 185;
- Judgment K 33/99 of 03.10.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 6, item 188; *Bulletin* 2000/3 [POL-2000-3-020];
- Judgment K 35/99 of 05.12.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 8, item 295;
- Judgment K 19/00 of 07.05.2001, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2001, no. 4, item 82;
- Judgment P 10/01 of 28.05.2002, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2002, no. 3A, item 35;
- Judgment P 3/03 of 28.10.2003, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2003, no. 8A, item 82;
- Judgment SK 31/04 of 30.11.2004, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2004, no. 10A, item 110;
- Judgment P 13/04 of 24.10.2005, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2005, no. 9A, item 102;
- Judgment K 1/05 of 21.02.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 2A, item 18;
- Judgment P 9/05 of 24.04.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 4A, item 46;
- Judgment P 30/05 of 29.06.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 6A, item 70;
- Judgment SK 15/06 of 11.12.2006, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2006, no. 11A, item 170;
- Judgment K 40/04 of 28.03.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 3A, item 33;
- Judgment P 10/07 of 23.10.2007, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2007, no. 9A, item 107; *Bulletin* 2008/1 [POL-2008-1-003];
- Judgment K 43/07 of 28.02.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 1A, item 8;

- Judgment K 33/07 of 11.12.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 10A, item 177;
- Judgment P 47/07 of 18.11.2008, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2008, no. 9A, item 156;
- Judgment U 10/07 of 02.12.2009, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2009, no. 11A, item 163; *Bulletin* 2010/1 [POL-2010-1-002].

*Languages:*

Polish.



Judgments of the Polish Supreme Court:

- Resolution III PZP 10/85 of 27.06.1985, *OSNC*, no. 11/1985, item 164;
- Judgment I PKN 419/97 of 04.12.1997, *OSNP*, no. 20/1998, item 598;
- Judgment I PK 219/07 of 19.03.2008, *OSNP*, nos. 13-14/2009, item 173;
- Judgment I PK 22/08 of 12.09.2008, *OSNP*, nos. 3-4/2010, item 32;
- Resolution I PZP 4/08 of 19.11.2008, *OSNP*, nos. 13-14/2009, item 165;
- Judgment I PK 86/08 of 16.12.2008, *Lex*, no. 497682;
- Resolution II PZP 13/08 of 21.01.2009, *OSNP*, nos. 19-20/2009, item 248;
- Judgment I PK 185/08 of 20.03.2009, *Monitor Prawa Pracy*, no. 7/2009, item 366.

Decisions of the European Court of Justice:

- Judgment 152/84 of 26.02.1986, *Marshall*;
- Judgment 262/84 of 26.02.1986, *Vera Mia Beets-Proper*;
- Judgment C-262/88 of 17.05.1990, *Barber*;
- Judgment C-188/89 of 12.07.1990, *Foster*;
- Judgment C-9/91 of 07.07.1992, *Equal Opportunities Commission*;
- Judgment C-328/91 of 30.03.1993, *Thomas*;
- Judgment C-92/94 of 11.08.1995, *Graham*;
- Judgment C-196/98 of 23.05.2000, *Hepple*;
- Judgment C-157/99 of 12.07.2001, *Geraets-Smits and Peerbooms*;
- Judgment C-92/02 of 04.12.2003, *Kristiansen*.

Decisions of the European Court of Human Rights:

- Judgment in the case of *Stec and others v. the United Kingdom* of 12.04.2006, applications nos. 65731/01 and 65900/01;
- Judgment in the case of *Barrow v. the United Kingdom* of 22.08.2006, application no. 42735/02;
- Judgment in the case of *Walker v. the United Kingdom* of 22.08.2006, application no. 37212/02;
- Judgment in the case of *Pearson v. the United Kingdom* of 22.08.2006, application no. 8374/03.

# Portugal

## Constitutional Court

### Statistical data

1 May 2010 – 31 August 2010

Total: 150 judgments:

- Abstract *ex post facto* review: 2 judgments
- Appeals: 123 judgments
- Appeals against refusal to admit: 18 judgments
- Declarations of assets and income: 2 judgments
- Matters concerning political parties: 3 judgments
- Political parties' accounts: 1 judgment
- Election matters: 1 judgment

### Important decisions

*Identification:* POR-2010-2-007

**a)** Portugal / **b)** Constitutional Court / **c)** Third Chamber / **d)** 12.05.2010 / **e)** 185/10 / **f)** / **g)** *Diário da República* (Official Gazette), 178 (Series II), 13.09.2010, 46927 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

5.3.5.1.3 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Detention pending trial.**

*Keywords of the alphabetical index:*

Remand in custody.

*Headnotes:*

Remand in custody, such as any measure that entails depriving someone of their liberty, is a restriction on the constitutional right of freedom that is expressly authorised by the Constitution. It is there to safeguard other values that enjoy constitutional protection, such as the efficiency of penal justice, security, and crucially, the freedom of other members of the community. The legislator is not obliged, under the Constitution, to provide for compensation in cases where an accused person is remanded in custody

and is subsequently acquitted of the charges against him or her. The only exception is if it is first confirmed that the use of the measure was excessive. Control over the way in which the ordinary legislature has fulfilled its duties to protect constitutionally protected assets, even if it has restricted individual rights, freedoms or guarantees in the process, cannot lead to the judicial authorities handing down judgments that in essence complete the state's legislative function.

*Summary:*

This Ruling deals with the question of the constitutional compliance of a norm of the Code of Criminal Procedure (hereinafter, the "CPP"), which subjects the right to compensation for unjustified remand in custody to the occurrence of a gross error in the judge's assessment of the factual prerequisites for this particular coercive measure. The appellant also argued that the restrictive regime contained in the Code of Criminal Procedure is contrary to the provisions of Article 5 ECHR.

The regime governing compensation for unlawful or unjustified deprivation of freedom that was applicable to the case (and has since been the object of a number of amendments that are not relevant here) made the award of compensation to persons who have been remanded in custody dependent on the fulfilment of either of two conditions: the measure's manifest unlawfulness or the existence of a gross error in the assessment of the factual prerequisites that led to its imposition. Setting aside cases of manifest unlawfulness, the regime provided for a right to compensation for lawful remand in custody, but subjected the formation of that right to the existence of a gross error in the judge's assessment of the factual prerequisites that led him or her to impose the coercive measure. Under the regime, the author of the request for compensation must demonstrate that there was a sufficiently gross error in the assessment of the factual prerequisites that caused him or her to be remanded in custody. Although the question as to whether such an error was made is posed in hindsight, it must always be judged in relation to the moment at and the circumstances in which the judge handed down the decision to remand – i.e. on the basis of the facts, elements and circumstances that existed when the remand measure was imposed or extended.

In the present Ruling, the specific question addressed by the Constitutional Court was the constitutional conformity of the normative segment contained in the CPP precept that subjects the right to compensation for being remanded in custody to the presentation of evidence by the accused person at a later date,

during a civil liability action against the state. Specifically, whether the CPP norm should be held unconstitutional when interpreted in such a way that the remand in custody of an accused person who is subsequently acquitted on the grounds of the principle of *in dubio pro reo* is not considered to be unjustified, and thus does not create an obligation on the part of the state to compensate, because the acquittal decision does not constitute sufficient proof of such a consideration. The appellant argued that it is unconstitutional, basing her argument on three points: the right to freedom and the scope of the protection afforded by the constitutional norm in which that right is enshrined; the institution of the state's extra-contractual civil liability, as outlined in the Constitution; and the international obligations which the Portuguese State undertook to fulfil when the norms set out in Article 5 ECHR were incorporated into Portuguese law.

The Court quoted its own case-law, which distinguishes between the question of constitutionality and the question of the best legislative solution. The Court naturally considered that it should only answer the first of these two questions.

It also did not deem it necessary to consider whether the court decision against which the present appeal was brought was in conformity with the European Convention on Human Rights, as it was of the opinion that Article 5 ECHR contains nothing that is not already present in the constitutional norm.

The Court observed that the risk which every individual runs of being remanded in custody if certain legal prerequisites are met results from the dual necessity of protecting the freedom of other people and that of safeguarding the communal assets of security and the efficiency of the penal system.

The subsequent question is therefore who ought to bear the burden of this risk in the event that an acquittal decision subsequently leads to the conclusion that in a given concrete situation the remand measure was not justified: the individual; or the community, in the person of all its members (the burden here taking the form of the state's duty to compensate). Within the system of assets and values that are protected by constitutional law, the legal asset that is protected by the constitutional right to freedom unquestionably occupies a leading place. The protection of freedom sits alongside the principles of the state based on the rule of law and the dignity of the human person. This is why the constitutional norm that enshrines the right to freedom must impose special duties to protect on the legislator, first and foremost in the shape of the requirement to pass norms that prevent each

person's freedom from being breached, either by an act of the community that has set itself up in the form of the state, or by an individual act undertaken by any of the community's members. The order contained in Article 27.5 of the Constitution of the Portuguese Republic (hereinafter, the "CRP"), under which deprivation of freedom contrary to the provisions of the Constitution and the law places the state under a duty to compensate (in whatever way the law stipulates), is included in one of those duties to protect, which pertain to the ordinary legislator and fulfilment of which is demanded by the particular importance that this constitutionally protected asset possesses.

Judging on how to weigh up the question of whether the risk of being lawfully remanded in custody that is run by an accused person who is then judicially acquitted should be borne by the accused, or by the community in the form of the imposition on the state of an obligation to compensate, is to judge a real conflict of freedoms. The Constitutional Court is not in a position to do so.

The Court also rejected the argument that the challenged norm might be unconstitutional because it is in breach of the constitutional norm that makes the state liable for actions which are undertaken in the exercise of its functions and which lead to a violation of rights, freedoms or guarantees or a loss to a third party. Inasmuch as it contains a restriction on the right to freedom that is not itself unconstitutional, the norm does not breach any right, freedom or guarantee. On the other hand, that which the constitutional norm on state liability does enshrine is an institution, thereby preventing the ordinary legislator from eliminating or changing essential elements of the latter.

#### *Supplementary information:*

One justice dissented, because he felt that the normative interpretation that was applied did not consist in denying the right to compensation of an accused person who has been subjected to remand in custody and has then been acquitted on the grounds of the principle of *in dubio pro reo*, but rather, in a more absolute manner, of denying that compensation to an acquitted person whose innocence has not been proven. In the dissenting justice's opinion, burdening the accused in this way with the need to prove that he or she "is above all suspicion" contradicts the ultimate meaning of the constitutional norm which enshrines the presumption that an accused person is innocent until the sentence in which he/she is convicted transits *in rem judicatam*.

*Cross-references:*

- Rulings nos. 160/95 and 12/05.

*Languages:*

Portuguese.

*Identification:* POR-2010-2-008

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 01.06.2010 / **e)** 216/10 / **f)** / **g)** *Diário da República* (Official Gazette), 129 (Series II), 06.07.2010, 36595 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

5.3.13.27.1 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – **Right to paid legal assistance.**

*Keywords of the alphabetical index:*

Legal aid / Legal aid, equal access / Legal aid, free, right.

*Headnotes:*

Where access to justice is concerned, there is no constitutional requirement to treat for-profit entities in the same way as natural persons and not-for-profit legal persons, by providing a generalised grant of free legal counsel in cases of a lack of sufficient economic resources.

*Summary:*

This Ruling concerned an appeal to the Constitutional Court by a for-profit legal person against a judicial decision that upheld the denial of a request for legal aid in the form of a dispensation from the court fee and other costs related to the case. The appellant had alleged that it did not possess the financial capacity to pay the cost of a lawsuit, which it did not in fact bring. It argued that legal persons cannot be required to have access to greater financial resources than natural persons, and that without the ability to

resort to legal aid and given its financial situation and the legal costs facing it, it was denied access to justice. It claimed that this is in breach of the constitutional requirement regarding access to the law and to effective jurisdictional protection.

The Constitutional Court emphasised that the constitutional requirement designed to guarantee access to the law and the courts falls within the scope of the fundamental rights that emanate from the value attached to the dignity of the human person. This is a right that is also enshrined in both the Universal Declaration of Human Rights and the European Convention on Human Rights.

It is widely recognised that fundamental rights pertain primarily to natural persons, and it is not legitimate to consider legal persons equivalent to the latter as holders of such rights. Indeed, the Constitution places a limitation on that equivalence when it states that “Legal persons enjoy the rights and are subject to the duties that are compatible with their nature”. It is certainly true that the right in question is compatible with the nature of legal persons. However, the situations of natural persons and not-for-profit legal persons on the one hand and of for-profit entities on the other are not comparable in terms of the effects of the state’s promotion of access to justice. For-profit entities are required by law to integrate any costs they may incur in relation to judicial litigation into their business activities, thereby ensuring the protection of both the asset-related interests of all their creditors and the general interest in the healthy development of the economy.

The Court’s case-law has underlined the fact that the existence of disputes arising from an enterprise’s normal commercial life, and the profit-oriented goal of such entities, mean that the costs incurred in relation to legal professionals must be incorporated into the planning for the enterprise’s normal business activities and must subsequently be reflected in the end price of the goods and services it supplies to the consumer. The inability to bear such costs is evidence of the enterprise’s lack of economic viability and may ultimately lead to its bankruptcy, thereby acting in favour of the healthy development of a free economy. The state must give priority to promoting access to justice by natural persons and not-for-profit entities, rather than the provision of public funding for the costs that are inherent in an enterprise’s normal, profit-making activities.

Although it is the state that shoulders the duty of guaranteeing access to justice by every citizen and of actually making it available to them, it is also necessary to bear in mind that in strictly economic terms, the administration of justice is an asset

bringing high costs to the community. Universal access to justice is generically guaranteed by the institution of legal aid, which ensures that no citizen is deprived of access to the law and the courts for financial reasons, all the more so in the socially more pressing field of criminal justice. In other situations – particularly those in which asset-related and economic interests are in play – the legislator felt that it was necessary to accept that a part of judicial costs be borne by the person who resorts to justice and derives benefit from it himself, rather than society as a whole. It was recognised that the previous system did not make provision for this objective, instead favouring those who resorted to the courts indiscriminately and without weighing up the consequences, as well as the party that was responsible for the cause of the action, thereby obliging the state (and the community) to bear the burden of paying for a large part of the resulting legal costs. This is why changes were made, both to the regime governing access to the law and the courts and the regime governing court costs.

The legislator wanted to lay down the principle that, save for particularly deserving cases, all subjects in legal proceedings, whatever their nature or the way in which the law qualifies them, must be subject to payment of court costs, provided they possess the economic and financial capacity to do so. The exceptions to this rule were then addressed under the heading of legal aid.

In 2004, by a majority, the Constitutional Court (Rulings nos. 106/2004 and 560/2004) held that it is unconstitutional to forbid the grant of free legal counsel to companies, and to do so even when they prove that their costs substantially exceed their economic possibilities and the actions in question fall outside the field of their normal economic activities.

However, in the first of these two cases the applicant for legal aid was a commercial company that was in the process of being liquidated in bankruptcy; while in both cases the object of the lawsuit had nothing to do with the normal business of the company in question.

The current norm governing the possibility of granting legal aid to for-profit legal persons is more restrictive than the previous law, to the point that it excludes that option without any exceptions.

Even so, the Court considered that this restriction is not in breach of either the right of access to the courts, or the principle of equality.

The norm in question does not make the right of access to justice entirely unviable, since legal persons that are in a truly loss-making situation are

exempt from court costs in any proceedings (except those related to labour law), and therefore do not need any support.

Moreover, legal persons are allowed to set legal costs against their tax liability, thus reducing their taxable income. Enterprises should also take out civil liability insurance to cover the cost of lawsuits that are not directly related to their business. Expenditure on such policies is also considered to be a tax-deductible cost (losses that arise out of insurable situations cannot be considered to be costs).

It should also be noted that to provide for-profit legal persons with protection in the form of legal aid would be to opt to protect the ability to litigate of commercial companies that are not in a position to be sure that they can continue to trade. This would be contrary to the constitutional requirement to ensure the proper operation of the markets in a way that guarantees balanced competition between enterprises, and their competitiveness.

The Court was also of the opinion that the norm before it does not constitute a disproportionate and unjustified restriction on the right to the effective implementation of access to justice, given that, even if it can be argued that the differentiation involved cannot be total, or that one must respect a certain proportionality in relation to the other possible situations, that differentiation is underpinned by reasons related to the public interest and the option adopted by the legislator was not arbitrary. The legislator enjoys a degree of discretion in the shaping of the practical implementation of the concept of a lack of sufficient economic means where legal aid is concerned. This is a reality with imprecise boundaries, which is inevitably linked not only to the concrete costs of the lawsuit in which the interested party is involved, but also to that party's economic situation.

#### *Supplementary information:*

Four justices, including the President of the Court, dissented from the majority opinion in this Ruling, taking the view that the Constitution guarantees everyone access to the law and the courts in order to defend their interests that are protected by law, and that justice cannot be denied due to insufficient economic resources. In their opinion, this right, which is included in the chapter on rights, freedoms and guarantees, is perfectly compatible with the nature of legal persons, even those whose goal is to make a profit. Inasmuch as access to the courts is not free, but rather subject to the payment of court fees, this constitutional right requires the construction of legal aid mechanisms that guarantee access to those who

are not economically well off, without limitations. Legal persons, even those whose objective is a profit, need access to the public judicial services in order to exercise their rights, and may also find themselves in a financial situation in which they are experiencing insufficient economic means with which to bear the costs of public judicial services.

#### *Cross-references:*

This Ruling refers to a large number of other Rulings issued by the Court, which indicate the jurisprudential differences that have existed in relation to this question. In particular, see Rulings nos. 106/04, 560/04 and 279/09.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2010-2-009

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 02.06.2010 / **e)** 224/10 / **f)** / **g)** *Diário da República* (Official Gazette), 177 (Series II), 10.09.2010, 46778 / **h)** CODICES (Portuguese).

#### *Keywords of the systematic thesaurus:*

5.3.19 Fundamental Rights – Civil and political rights – **Freedom of opinion.**  
5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

#### *Keywords of the alphabetical index:*

Information, right to seek, obtain and disseminate / Place, public, use / Property, public, use for advertising.

#### *Headnotes:*

The attribution to the mayor of a municipality of the competence to hear and decide cases involving administrative offences related to the exercise of rights associated with the freedoms of expression and information, when what is at stake is propaganda, is not in breach of the constitutional precept that

reserves the competence to hear and decide cases involving such offences to an independent administrative entity.

#### *Summary:*

This case involved a request by the Ombudsman for a successive abstract review. He asked the Constitutional Court for a declaration with generally binding force of the unconstitutionality of the norm contained in an article of a law, which regulates the display of advertising and propaganda in public places, when applied to propaganda. He argued that it violates the constitutional precept under which violations committed during the exercise of the right to freedom of expression and information are subject to the general principles of either the criminal law, or the law governing administrative offences, and that in the case of the latter, the competence to hear cases pertains to an independent administrative entity.

The Constitutional Court's case-law clearly sets out that under constitutional law, propaganda – particularly political propaganda – is a manifestation of the freedom of expression, inasmuch as the latter is considered to cover both the right to manifest one's own thoughts (substantive aspect), and the right to the free use of means by which those thoughts can be disseminated (instrumental aspect).

The law in which the norm in question was incorporated had already been held to be unconstitutional in a concrete review case, when the Court considered that the legal solution took the competence to hear and decide cases involving such infractions away from the courts of law, and thus implicitly removed them from the protection of the general principles of criminal law, including all the guarantees applicable to criminal procedure. However, the law was passed while the 1982 version of the Constitution (hereinafter, the "CRP") was in effect, and at the time the applicable article of the CRP was written in such a way as to subject violations related to the rights associated with the freedom of expression and information to the general principles of criminal law, and the competence to hear cases with regard to them pertained to the courts of law. There was no mention (one was introduced in the 1997 constitutional review) of the general principles governing administrative offences and the attribution of the competence to hear such cases to an independent administrative entity. The express provision made in the 1997 review of the Constitution, that violations committed during the exercise of the rights to freedom of expression and information not only attract sanctions under the criminal law, but also under the law governing administrative offences, was a move that matched the interpretation which the

Constitutional Court was already applying to the previous text of the article. The Court was already holding that not all violations committed during the exercise of the rights to freedom of expression and information should be subject to criminal sanctions. The most significant change in the article in question was thus that which extended the competence to hear and decide cases involving violations to an independent administrative entity, thereby contradicting the original text of the constitutional precept. It also contradicted the Constitutional Court's interpretation up until the 1997 constitutional review, whereby the imposition of fines for violations committed during the exercise of the rights to freedom of expression and information was also reserved to courts of law.

In the light of the current text of this constitutional precept, the Court felt that the latter means that there is no guarantee of the "jurisdictionalisation" of proceedings for violations committed during the exercise of the rights to freedom of expression and information, and therefore that there is no requirement for the competence to hear the case to pertain to a court of law, regardless of the nature of the violation (crime or administrative offence).

The Constitution does not attribute a general competence to hear and decide cases involving violations that constitute administrative offences to an independent administrative entity. The constitutional precept only requires that cases involving violations that constitute administrative offences committed during the exercise of the rights to freedom of expression and information, via the media, be heard by the independent administrative entity with responsibility for regulating the media. The Court therefore decided not to declare the material unconstitutionality of the norm before it, when applied to propaganda, with generally binding force.

#### *Supplementary information:*

The Ruling was accompanied by two concurring opinions and four dissenting opinions, one of the latter being that of the President of the Court.

The author of the first concurring opinion agreed with the majority finding that the norm is not unconstitutional, but disagreed with the path that the rapporteur took in order to formulate that finding. In her view, the issue was not whether what is at stake are limits or restrictions on the freedom of expression and the legitimacy or otherwise of those limits, but rather the minimum rules for the policing of public spaces laid down by the law in question – i.e. whether the ordinary legislator had fulfilled a number of constitutional duties to provide normative protection, themselves endowed with a certain degree of binding

force. In her view, fulfilment by the legislator of those duties to protect is not restriction or limit on freedom of expression, but instead compliance with the minimum rules on the policing of public spaces, the competences for which pertain to democratically legitimated local authorities.

The dissenting justices based their opinions on the fact that they considered that the competence of the independent administrative entity which the constitutional precept in question entrusts with the responsibility to hear and decide cases involving administrative offences committed during the exercise of the freedom of expression and information covers all administrative-offence-type infractions committed by any means or form of expression. In their view, this competence is not restricted to administrative offences committed during the exercise of the freedom of expression and information via the media. Given that the case before the court involved propaganda, and accordingly fell within the reserved field of the right to express thoughts, the authors of the dissenting opinions felt that only the "independent administrative entity" has the competence to impose fines, and therefore the Court should have held the norm unconstitutional.

#### *Cross-references:*

- See Rulings nos. 631/95 and 258/06.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2010-2-010

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 29.06.2010 / **e)** 257/10 / **f)** / **g)** *Diário da República* (Official Gazette) / **h)** CODICES (Portuguese).

#### *Keywords of the systematic thesaurus:*

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

#### *Keywords of the alphabetical index:*

Right to a proper living / Attachment / Minimum wage.



### Headnotes:

Judges are able to settle the amount of income which could be attached on a case-by-case basis, weighing up and taking into account the interests of the creditor and the party whose assets were to be attached, in compliance with the requirements imposed by the Constitution. The legislation does not ban the attachment of earnings that are equal to the national minimum wage. Exemptions are possible in relation to assets that might otherwise be attachable, for reasons concerning the nature of the debt that gave rise to the request to attach and the needs of the party whose assets were to be attached and those of his or her household.

### Summary:

This Ruling was handed down in relation to an appeal that the Public Prosecutors' Office lodged against a decision in which a court refused to apply the Code of Civil Procedure under which the only occasion on which a person's pay cannot be attached is when the amount of pay is equal to that of the national minimum wage and the person in question proves that he or she has no other income. The Public Prosecutors' Office was legally obliged to bring this appeal, because the court in question refused to apply a norm contained in a legislative act, on the grounds that that norm is unconstitutional.

The question before the Court was that of respect for the right to a proper living. This right is not expressly enshrined in the Constitution, but has been rendered operable in constitutional case-law on the basis of principles that are so enshrined. A considerable amount of case-law exists on this subject, and the principle has been unanimously recognised, but has varied with regard to the exact amount that should be deemed the threshold below which attachment is not permitted. The Constitutional Court has been divided as to whether that threshold should be the minimum wage, or the amount of the social benefit that is awarded in the form of minimum guaranteed income or social income.

In the present case, a question had arisen over the viability of attaching part of a salary when the amount of that salary was equal to the amount of the national minimum wage. The court *a quo* refused to apply the norm that was in effect at the time, which stated that two thirds of the pay or salary earned by a party whose assets were subject to execution was not available for attachment. The norm allowed the judge to vary the proportion that was attached, from one third to one sixth, and possibly to exempt income from attachment altogether. This would depend on the nature of the debt and the needs of the party

whose assets were to be executed and his or her household (under the current version of the norm, the minimum amount that is unavailable for attachment is equal to the amount of the minimum wage, when the affected party has no other income and the credit that gives rise to the attachment is not related to maintenance payments).

The question of unconstitutionality under scrutiny was whether the fact that the decision would be made on a case by case basis by the judge on whether pay could be attached, when that pay is equal in amount to the national minimum wage, was in breach of the principle of human dignity.

The present Ruling corroborates the fact that not only does the Constitution expressly recognise the value of human dignity, but that the latter is one of its key core values and both inspires and provides the grounds for the whole legal system. It possesses the nature of an eminent value pertaining to the human person, as a being who is autonomous, free and socially responsible. This is the perspective that has underlain the analyses of the questions that are rooted in the so-called principle of a proper level of subsistence, or in the right to live properly in a way that does not fall below a minimum level. The Court recalled its own case-law, in which it has on several occasions affirmed the prevalence of the right to a proper living over the right to recover a debt. In various Rulings the Court has specifically held that the right pertaining to debts should give way to the right to a minimum level of subsistence, thereby precluding the attachment of income received in the form of pensions in cases in which that income does not exceed the minimum wage.

The direction it took in that case-law led the Court to declare, with generally binding force, the unconstitutionality of that part of the Code of Civil Procedure norm that made provision for assets that can be partially attached – it is permitted to attach up to one third of the periodic payments made to a party whose assets are subject to execution who does not possess other assets which would suffice to repay the debt, when they take the form of social benefits or pensions with an overall value that does not exceed that of the national minimum wage. This would be in breach of the principle of the dignity of the human person contained within the principle of the state based on the rule of law.

In its earlier case-law, the Court had also held that where this effect on the possibility of attaching assets is concerned, the situation of individuals who find themselves in a debilitating situation such as ill health, inability to work or lack of protection and therefore receives social benefit is equivalent to that

of a worker who, if he or she has no other attachable assets and only earns the minimum wage, would be deprived of an amount equal to that of the national minimum wage if it were permissible to attach part of his or her salary.

The case forming the object of the present Ruling was different, inasmuch as it involved the decision of the court *a quo* not to apply the norm, regardless of whether the party had other attachable assets.

The Constitutional Court has already pointed out (Ruling no. 657/2006) that the grounds for legally treating pensions and other social benefits on the one hand, and pay and wages on the other, differently are their different natures. This difference makes it possible to say that when the legislator determines the amount of the minimum wage, account is taken not only of considerations concerning the principle of commutative justice and the idea of the dignity of labour, but also of other social and economic reasons, such as workers' needs, increases in the cost of living, variations in productivity, and the sustainability of the public finances. This in turn means that the minimum wage cannot, with absolute certainty, be seen as the indispensable guarantee of a minimum level of subsistence that is itself implicit in the principle of the value of human dignity.

The Constitutional Court therefore concluded that the norm before it was not unconstitutional.

#### *Cross-references:*

- See Rulings nos. 177/02, 96/04 and 657/06.

#### *Languages:*

Portuguese.



## Romania

### Constitutional Court

#### Important decisions

*Identification:* ROM-2010-2-002

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 07.06.2010 / **e)** 820/2010 / **f)** Decision concerning the application for review of the constitutionality of the provisions of the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 / **g)** *Monitorul Oficial al României* (Official Gazette), 420/23.06.2010 / **h)** CODICES (French).

#### *Keywords of the systematic thesaurus:*

3.12 General Principles – **Clarity and precision of legal provisions.**  
 3.16 General Principles – **Proportionality.**  
 5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**  
 5.3.38 Fundamental Rights – Civil and political rights – **Non-retrospective effect of law.**

#### *Keywords of the alphabetical index:*

Penalty, collective / Lustration, delay.

#### *Headnotes:*

The Law of Lustration regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 establishes a new basis for limiting access to public offices, consisting in affiliation to the structures of the communist regime. However, a law cannot introduce collective penalties, based on a presumption of guilt resulting from a mere affiliation to the regime. A law cannot be adopted in violation of the principle of non-retroactivity, and, moreover, the delay in passing this Law – 21 years after the fall of communism – is relevant in determining the disproportionate nature of the restrictive measures.

### Summary:

Acting in accordance with Article 146.a of the Constitution, within the context of a *a priori* review, a group of 29 senators and 58 deputies made an application for the review of the constitutionality of the provisions of the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989.

The applicants alleged that the Lustration Law breached Article 37.1 of the Constitution in conjunction with Articles 16.3 and 40.3 of the Constitution, in that the Law provided for a new situation which would justify a restriction on the right of access to public offices – a situation not provided for by Article 53 of the Constitution. Even if it were possible to restrict the right of access to public offices on grounds of membership in certain bodies of the communist regime, the question would still arise of the proportionality and legal effectiveness of such measures in the light of their adoption more than 21 years after the fall of the communist regime. Thus, the Law violated the requirement of foreseeability of the rule of law by introducing a limitation on the right to stand for election on the basis of a general guilt founded on the mere criterion of membership in the structures of a system which, at the time of its existence, was consistent with the constitutional and statutory provisions applicable in the Romanian State. The applicants further submitted that the Lustration Law clearly created discrimination between Romanian citizens with respect to access to public functions, appointed or elected, on the ground of membership in the Communist Party between 6 March 1945 and 22 December 1989. The Lustration Law contravened Articles 11.2 and 20 of the Constitution on the supremacy of international legal instruments ratified by Romania in the field of human rights.

The main flaw of the Lustration Law was that it created a genuine collective sanction, based on a form of collective responsibility and general guilt based on political criteria. Thus, mere membership in a political structure or a body belonging to a political regime amounted to a presumption of guilt, regardless of how a person acted and behaved while holding a position. In that connection, the applicants invoked the conclusions by the Venice Commission in Opinion no. 524/2009 (CDL(2009)132) with respect to the Lustration Law of Albania stating the provisions of the Lustration Law on the termination of mandate violated the constitutional guarantees of their [the persons holding the offices in question] mandate, and it found “there are several elements which indicate

that the Lustration Law could interfere in a disproportionate manner with the right to stand for election, the right to work and the right of access to the public administration.”

Analysing the application to the Court alleging the unconstitutionality of the law as a whole, the Constitutional Court holds as follows:

In Romania, communism was condemned as doctrine, and the change of the regime was established by legal acts which rank as constitutional law, such as the Message to the People of the Council of the National Salvation Front (FSN), published in the Official Gazette, Part I, no. 1 of 22 December 1989, and the Legislative Decree on the establishment, organisation and functioning of the National Salvation Front and of regional councils of the National Salvation Front, published in the Official Gazette, Part I, no. 4 of 27 December 1989.

Every country faced with the problem of lustration has adopted a certain method of achieving lustration based on the aim pursued and the national specific situation. The Czech Republic adopted a radical model, Lithuania and the Baltic countries adopted an intermediate model, and Hungary, Poland and Bulgaria adopted a moderate model.

After an unsuccessful attempt – that of 1997 – the adoption of the Lustration Law in Romania has no legal effect – it is not up-to-date, necessary or useful; it is only of moral significance, given the long period of time which has elapsed since the fall of the communist totalitarian regime. Citing Article 53 of the Constitution, the initiators of the Law themselves state that the Lustration Law refers to the constitutional rule that the “the exercise of certain rights or freedoms may solely be restricted by law, and only if necessary, as the case may be: for the defence of [...] morals, [...]”, morals tainted by customs of communism.

With respect to high public positions in Romania, non-affiliation with the old communist structures is currently not a condition of employment ; there is only an obligation for such persons to declare their affiliation or non-affiliation with the former political police.

The Court notes the imprecise, confusing and inadequate wording of the preamble to the Law, which leads to the conclusion that the restrictions and prohibitions in this Law are aimed at the “restriction on the exercise of the right to be appointed or elected to public offices of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989”.

The Court also notes that the provisions of the Lustration Law, not being sufficiently clear and precise, have no regulatory rigour.

The Court observes that according to the impugned law, liability and penalties are based on the fact that a person held an office in the structures and repressive apparatus of the former communist totalitarian regime. Liability, regardless of its nature, is primarily an individual responsibility, and it arises only on the basis of acts and actions carried out by a person and not on presumptions.

The Lustration Law is excessive in relation to the legitimate aim pursued, since it does not allow for the individualisation of its measures. The Law establishes a presumption of guilt and a genuine collective punishment, based on a form of collective responsibility and a generic, comprehensive guilt, established on political criteria; this contravenes the principles of the rule of law, the legal order and the presumption of innocence laid down by Article 23.11 of the Constitution. Even if the impugned law allows recourse to justice for justifying the prohibition of the right to stand for election and be elected to certain offices, it does not provide for an adequate mechanism for determining the actual activities carried out against fundamental rights and freedoms.

No one shall be subjected to lustration for his or her personal opinions and own beliefs, or for the mere reason of association with any organisation which, at the time of association or carrying out of the activity, was legal and did not commit any serious human rights violations. Lustration is permitted only with respect to those persons who actually took part, together with State bodies, in serious violations of human rights and freedoms.

Article 2 of the law under constitutional review provides for one of the major collective penalties listed concerning the right to stand for election and the right to be elected to high public offices for persons who belonged to certain political and ideological structures. The statutory provisions of that article are contrary to the constitutional provisions of Articles 37 and 38, which enshrine the right to be elected, with the prohibitions being expressly and exhaustively listed. It is clear that the provisions of Article 2 of the Lustration Law exceed the constitutional framework, creating a new ban on the right of access to public office, which fails to comply with Article 53 of the Constitution relating to restrictions on the exercise of certain rights or freedoms.

The Court considers that the Lustration Law infringes the non-retroactivity principle enshrined in Article 15.2 of the Constitution, which states: "The law shall only take effect for the future, except the more favourable law which lays down penal or administrative sanctions." A law applies to facts occurring and acts committed after its entry into force. Therefore, it cannot be maintained that when respecting the laws in force and acting in the spirit thereof, citizens should consider any possible future regulations.

The Court notes that the Lustration Law was passed 21 years after the fall of communism. Consequently, the late enactment of this law, without being decisive in itself, is considered by the Court as relevant with respect to the disproportionate nature of the restrictive measures, even if they pursue a legitimate aim. The proportionality of the measure to the aim pursued must be considered in each case in the light of an assessment of the country's political situation as well as other circumstances.

In this respect, the case-law of the European Court of Human Rights on the legitimacy of lustration law over time is relevant; here, the Court refers to the case of *Zdanoka v. Latvia*, 2004.

For the reasons set forth herein, the Constitutional Court finds that the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 is unconstitutional.

*Languages:*

Romanian.



# Russia

## Constitutional Court

---

### Important decisions

*Identification:* RUS-2010-2-004

**a)** Russia / **b)** Constitutional Court / **c)** / **d)** 22.06.2010 / **e)** 14 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 07.07.2010 / **h)** CODICES (Russian).

*Keywords of the systematic thesaurus:*

4.9.1 Institutions – Elections and instruments of direct democracy – **Competent body for the organisation and control of voting.**

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections.**

5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement.**

5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity.**

*Keywords of the alphabetical index:*

Election, electoral commission / Electoral commission, members / Residence permit / Election, citizen, residing abroad.

*Headnotes:*

The fact of citizens of the Russian Federation holding a residence permit for a foreign State does not restrict their rights and liberties, particularly as regards participation in electoral commissions.

*Summary:*

This case was considered on the basis of an appeal lodged by a citizen challenging the constitutionality of specific provisions of the Federal Law on the principal safeguards of the electoral rights of citizens.

The appellant had been appointed a member of the electoral commission of a Moscow district in 2006. On 12 June 2009 he received a residence permit for the Republic of Lithuania. He reported this fact to the Moscow Electoral Commission, which later cancelled his membership of the Electoral Commission. The

appellant then went to court to challenge this decision, albeit unsuccessfully.

He considers that the disputed rules contradict the Russian Constitution, which guarantees equality of the rights and liberties of a human being and citizen regardless of place of residence, and the right to participate in the administration of the affairs of the State. He asserts that the holding of a residence permit does not threaten the fundamentals of the Constitutional system, morality, health, rights and lawful interest of other persons, or ensuring the defence of the country and the security of the State. Human and civil rights and liberties can only be restricted by Federal law in pursuit of these goals. This is why the appellant considers the challenged rules to be discriminatory.

The Constitution secures the right of Russian citizens to participate in the administration of the affairs of the State, both directly and through their representatives. This right enables every citizen to be a bearer of the people's sovereignty without discrimination or arbitrary restriction. Any restriction on human and civic rights and liberties must be justified and appropriate. It is inadmissible to restrict civic rights and liberties solely in order to ensure the rational organisation of the public service.

Citizen participation in the work of the electoral commissions is a means of participating in the administration of the affairs of State. The latter help protect the interests of the citizens, who enjoy electoral and referendum rights. For instance, the commissions must be set up and their work organised in such a way as to guarantee electoral and referendum rights. They must comply with the law and with international standards and be based on the principles of legality, independence, collective responsibility and public access.

The voting members of the electoral commission of a given district generally exercise their activities on a non-permanent basis. There are no special requirements linked to education, age or income in order to be eligible. Under the Constitution, only citizens of the Russian Federation can be members of an electoral commission, because such membership entitles them to participate in the administration of the affairs of the State.

The granting of a residence permit to a Russian citizen certifies his/her right to reside in a specific country. This may be necessitated by work or studies, the possession of real property, family relations or other reasons. The issuing of a residence permit does not inevitably mean that citizens alter their allegiance to their country; neither does it generate a

relationship to the foreign country equivalent to Russian nationality. The issuing of a residence permit is different from the naturalisation process and does not entail any weakening, in the instant case, of the appellant's links with Russia.

The Constitution contains no rules on the aims of leaving the territory of the Russian Federation or the duration and conditions of residence abroad. A period of residence abroad does not lead to the forfeiture of Russian nationality. The fact of Russian citizens holding a residence permit in a foreign State does not restrict their rights and liberties. Moreover, the Russian Federation guarantees the protection of its citizens and their rights outside its borders.

The fact of a citizen of the Russian Federation holding the citizenship of a foreign State does not restrict his/her rights and liberties and does not exonerate him/her from the obligations arising from Russian citizenship, unless otherwise stipulated in a Federal law or international treaty.

Mutual trust and respect between citizens and the State must not depend on their effective right of residence. The State is required to respect and protect its citizens. The participation of a person holding a foreign residence permit in the work of the electoral commission of a constituency does not pose any threat to the foundations of the constitutional order, morality, health, rights and legal interest of others, or the guarantee of the defence and security of the State. It does not cast doubt on the capacity of this citizen to discharge his/her duties independently and impartially, in conformity with the law. Accordingly, restricting such a citizen's right to participate in the administration of State affairs as a member of an electoral commission is incompatible with the principle of equal rights and liberties for all citizens. This could lead to a breach of constitutional law and the citizens' loyalty to their State of nationality would be arbitrarily disturbed.

The Court ruled that the challenged provisions barring citizens holding residence permits from foreign States from membership of an electoral commission are not in conformity with the Constitution.

*Languages:*

Russian.



## Slovakia

### Constitutional Court

#### Statistical data

1 May 2010 – 31 August 2010

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 8
- Decisions on the merits by the Court panels: 125
- Number of other decisions by the plenum: 8
- Number of other decisions by the panels: 366



# Slovenia

## Constitutional Court

### Statistical data

1 May 2010 – 31 August 2010

In the period covered by this report, the Constitutional Court held 19 sessions (9 were plenary and 10 were in panels). Of these, 3 were in civil chambers, 2 in penal chambers and 5 in administrative chambers. The Constitutional Court received 115 new requests and petitions for the review of constitutionality/legality (U-I cases) and 233 constitutional complaints (Up-cases).

In the same period, the Constitutional Court resolved 52 cases in the field of the protection of constitutionality and legality, as well as 423 cases in the field of the protection of human rights and fundamental freedoms.

Judgments are published in the Official Gazette of the Republic of Slovenia, whereas the decisions of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

However, the judgments and decisions are published and submitted to users:

- In an official annual collection (Slovenian full text versions, including dissenting/concurring opinions, and English abstracts);
- In the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);
- Since August 1995 on the Internet, full text in Slovenian as well as in English [www.us-rs.si](http://www.us-rs.si);
- Since 2000 in the JUS-INFO legal information system on the Internet, full text in Slovenian, available through [www.ius-software.si](http://www.ius-software.si);
- Since 1991 bilingual (Slovenian, English) version in the CODICES database of the Venice Commission.

### Important decisions

*Identification:* SLO-2010-2-004

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.06.2010 / **e)** U-II-1/10 / **f)** / **g)** *Uradni list RS* (Official Gazette), 50/2010 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

1.3.4.6 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of referendums and other instruments of direct democracy.**

1.6.6 Constitutional Justice – Effects – **Execution.**

4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**

5.1.1.1.1 Fundamental Rights – General questions – Entitlement to rights – Nationals – **Nationals living abroad.**

5.1.1.3 Fundamental Rights – General questions – Entitlement to rights – **Foreigners.**

5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**

5.3.9 Fundamental Rights – Civil and political rights – **Right of residence.**

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

*Keywords of the alphabetical index:*

Residence, permanent, registration / Residence, discrimination / Referendum, restriction / Remedy, violation, constitutional right / Compensation, damage, entitlement.

*Headnotes:*

It is necessary to accord priority over the right to decision-making in a referendum to the rule of law, the right to equality before the law, the right to personal dignity and safety, the right to obtain redress for violations of human rights, as well as the authority of the Constitutional Court.

*Summary:*

I. In 1999 the Constitutional Court first established the unconstitutionality of the statutory regulation of the legal status of citizens of other republics of the former SFRY who were removed from the register of permanent residents by Decision no. U-I-284/94.

The National Assembly responded to this decision of the Constitutional Court quickly by passing the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia. This Act enabled citizens of other republics of the former SFRY who had been removed from the register of permanent residents to obtain a permanent residence permit, and, in accordance with the subsequent amendments to the Citizenship Act, to obtain citizenship of the Republic of Slovenia under more favourable conditions. However, none of these rights could be asserted by those individuals against whom the measure of the forcible removal of an alien from the country was pronounced or who left the Republic of Slovenia for other reasons that were directly connected with their erasure from the register of permanent residents and were not able to return. Therefore, in 2003 the Constitutional Court decided, by Decision no. U-I-246/02, that the Act was unconstitutional.

Concerning the decision on the retroactive recognition of permanent residence, the Constitutional Court explicitly stated at that time that a permanent residence permit does not determine a new legal status for these persons, but only establishes, in accordance with the existing situation, the legal status which had already existed. In point 8 of the operative provisions the Constitutional Court precisely determined for these persons the manner of the execution of the Decision, namely that the permanent residence permits to be issued establish permanent residence status retroactively, and ordered the Ministry of the Interior to issue supplementary decisions on the establishment of permanent residence status with effect from the individual's erasure as an official duty. However, special statutory regulation is still necessary to regulate the legal status of persons who were removed from the country as aliens and those who left the Republic of Slovenia for other reasons that were directly connected to their erasure from the register of permanent residents and were not able to return.

The legislature adopted the second set of amendments to the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia in response to the unconstitutionality of the regulation in force that was established by the Constitutional Court seven years ago. The proposed Act eliminates, in a manner consistent with the Constitution, the unconstitutionality found in Decision no. U-I-246/02, namely that the status of permanent residence should be retroactively recognised for those who have been forcibly removed from the register of permanent residents provided they meet the condition of actually residing in Slovenia. This legal fiction was established for the purpose of eventual proceedings that were or

could be initiated by individuals regarding the assertion of their rights conditional upon their permanent residence, but cannot have any other legal consequences on its own. In particular, it cannot be used to retroactively establish legal relationships that could have existed had it not been for their erasure from the register of permanent residents. The Act also eliminates, in a constitutionally compliant manner, other unconstitutionality found in Decision no. U-I-246/02.

II. In the light of the above, in order to determine the existence of unconstitutional consequences, if the law was to be repealed at a referendum, the Constitutional Court proceeded to weigh up the constitutional values of the right to a referendum and other constitutional values that do not support it being conducted. It decided that the principles of a state governed by the rule of law, the right to equality before the law, the right to personal dignity and safety, the right to obtain redress for violations of human rights, and the authority of the Constitutional Court must be given priority over the right to decision-making at a referendum. It accordingly concurred with the petitioner's view that unconstitutional consequences would occur due to the rejection of the Act at a referendum.

#### *Languages:*

Slovenian, English (translation by the Court).



#### *Identification:* SLO-2010-2-005

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 07.10.2010 / **e)** Up-2443/08 / **f)** / **g)** *Uradni list RS* (Official Gazette), 84/2009 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

#### *Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**



5.3.13.17 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Rules of evidence.**

5.3.13.19 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Equality of arms.**

*Keywords of the alphabetical index:*

Evidence, new, consideration / Witness, hearing / Expert, opinion.

*Headnotes:*

A party's right to be heard, enshrined in Article 22 of the Constitution, also entails the right, with respect to the fundamental requirement of the equality and procedural equal footing of the parties, to take part in the evidentiary proceedings and the possibility to express an opinion as to the results of the taking of evidence. If a party motions for an additional examination of an expert witness or of another expert witness regarding the same topic at issue, this does not constitute new evidence. If the question is the same, as a rule this is not a new motion for evidence.

*Summary:*

I. The complainants claimed compensation in civil proceedings for pecuniary and non-pecuniary damage sustained due to the death of their son. They based their claim in the lawsuit on the alleged medical malpractice and incompetent treatment administered by the physician and on the allegedly insufficient equipment of the hospital and inadequate organisation of the work in the hospital. Their main complaint concerned the fact that they were precluded from submitting any new facts or evidence after the first main hearing.

II. By its judgments, dated 28 June 2007 and 9 April 2009, the European Court of Human Rights found that there was a procedural violation of Article 2 ECHR due to the State's failure to ensure an effective and independent system for establishing the cause of and responsibility for the death of an individual receiving medical care. In the sphere of medical responsibility, the procedural obligation under Article 2 ECHR is satisfied if the legal system affords the concerned individual a remedy in civil proceedings (either alone or in conjunction with a remedy in criminal proceedings), enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained.

In the civil dispute at issue, the fundamental principles of the civil proceedings which hold for all civil matters must be respected in order to ensure fair proceedings and an equal footing for the parties to proceedings. The Constitutional Court has different prerogatives in these proceedings from those the European Court of Human Rights had when deciding on the complaints of the complainants against the state. For instance, the Constitutional Court could annul the disputed decision, which the European Court of Human Rights could not. On the other hand, the Constitutional Court is limited to examining the objections asserted by the complainants in the constitutional complaint, and these are of a procedural nature. The complainants perceived the alleged violation of the constitutional right to the equal protection of rights in judicial proceedings (Article 22 of the Constitution) in that the courts did not take into consideration their allegations, particularly as the physician did not fulfil the explanatory duty and their motion for evidence regarding appointing a (new) medical expert because they were submitted too late, i.e. after the first main hearing.

The establishment of the system of preclusions is justified by the demand to ensure a trial within a reasonable time, which is an essential part of the constitutional right to effective judicial protection. The Constitutional Court holds that this is a constitutionally admissible aim and can serve as the basis for the legislature's limitation of the right to be heard in proceedings, as protected by Article 22 of the Constitution. It is the responsibility of the legislature and also of the Court in a particular case to find the right balance between ensuring the concentration and acceleration of the proceedings, on the one hand, and a correct judgement from the substantive law point of view, on the other hand. This was the reason why in Article 286.4 of the Civil Procedure Act the legislature allowed the parties to submit new facts and motion for new evidence even at the subsequent main hearings, but only if they were not able to submit them at the first main hearing without fault on their part. Therefore the time limit for submitting facts and motioning for evidence cannot be said to constitute an excessive interference with the right to be heard as determined in Article 22 of the Constitution.

A party's right to be heard, enshrined in Article 22 of the Constitution, also entails the right, with respect to the fundamental requirement of the equality and procedural equal footing of the parties, to take part in the evidentiary proceedings and the possibility to express an opinion as to the results of the taking of evidence. If a party motions for an additional examination of an expert witness or of another expert witness regarding the same topic at issue, this does

not constitute new evidence. If the question is the same, as a rule this is not a new motion for evidence and therefore the limitation under Article 286 CPA is not applicable. The Constitutional Court held that by applying the limitation contained in Article 286 CPA to the motion for evidence, the Court deprived the complainants of their right to participate in the taking of the evidence, and, as a result, the Court violated their right under Article 22 of the Constitution. Therefore, the Constitutional Court overturned the disputed judgments and remanded the case to the District Court for new adjudication.

#### *Languages:*

Slovenian, English (translation by the Court).



## South Africa Constitutional Court

### Important decisions

*Identification:* RSA-2010-2-004

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 11.05.2010 / **e)** CCT 100/09; [2010] ZACC 10 / **f)** Stephen Segopotso Tongoane and Others v. Minister for Agriculture and Land Affairs and Others / **g)** [www.saflii.org/za/cases/ZACC/2010/10.html](http://www.saflii.org/za/cases/ZACC/2010/10.html) / **h)** CODICES (English).

#### *Keywords of the systematic thesaurus:*

4.5.6 Institutions – Legislative bodies – **Law-making procedure.**

4.5.6.5 Institutions – Legislative bodies – Law-making procedure – **Relations between houses.**

4.8.8 Institutions – Federalism, regionalism and local self-government – **Distribution of powers.**

#### *Keywords of the alphabetical index:*

Bill, passing by both chambers of Parliament / Local self-government, legislative power / Region, legislative procedure.

#### *Headnotes:*

In determining the procedure to be followed for bills (draft laws) affecting the provinces, Parliament must consider whether the provisions of the bill substantially affect their interests. If the provisions substantially affect the interests of the provinces, Parliament must follow the specified procedure (which gives different weight to the provinces' views) for its enactment. This will ensure that the provinces participate fully and effectively in the law-making process.

#### *Summary:*

I. The Constitution of the Republic of South Africa requires that Parliament enact legislation to provide for legally secure land tenure. In fulfilment of this obligation, Parliament enacted the Communal Land Rights Act 11 of 2004 (CLARA).

The applicants were four rural communities who claimed their communal land rights were affected by CLARA. They alleged that the use and occupation of their land was regulated by indigenous law, and were concerned that their indigenous-based system of land administration would be replaced by the new system envisaged by CLARA. The communities were further concerned that their land would be subject to the control of traditional leaders. They challenged CLARA on the basis that the legislation was invalid because in breach of the Bill of Rights it undermined their security of land tenure. They also challenged the legislation on the basis that Parliament followed the incorrect procedure in enacting it, and therefore that it was void.

The Constitution regulates the manner in which legislation is to be enacted. It prescribes different procedures for bills affecting the provinces and bills not affecting the provinces. When a bill is introduced, Parliament is required to classify the bill in order to determine the procedure to be followed in accordance with the Constitution.

When CLARA was introduced, Parliament classified it as a bill not affecting the provinces. Accordingly, Parliament followed the appropriate procedure because it took the view that the substance or true purpose of the bill related to land tenure, and land tenure was a subject outside the legislative competence of the provinces. However, the communities asserted that CLARA substantially affected the areas of indigenous law and traditional leadership, which fell within the legislative competence of the provinces. Therefore, CLARA should have been classified as a bill affecting the provinces, and enacted by the province-oriented procedure.

II. The Constitutional Court endorsed the approach in *Ex Parte* President of the Republic of South Africa: *In re* Constitutionality of the Liquor Bill, which distinguished between the characterisation of a bill for the purpose of determining legislative competence and classification for the purpose of determining which procedure should be adopted for its enactment. The Court accepted the test that where a bill's provisions "in substantial measure" fall within an area regulated by the provinces, it must be classified as a bill affecting the provinces.

The Court reasoned that the classification of a bill for the purpose of determining the procedure for its enactment is not concerned with determining the sphere of government that has the competence to legislate, or with preventing interference in another sphere of government. Instead, the process is concerned with how a bill must be considered by the provinces. Parliament must be informed by the need

to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them.

In considering whether CLARA substantially affected the interests of the provinces, the Court found that CLARA seeks to replace a living indigenous law regime which regulates the occupation, use and administration of communal land. It replaces this system with a regime that gives traditional leaders new and wide-ranging powers and functions. It follows that CLARA substantially affects indigenous law and traditional leadership. Since these areas fall within the interest of the provinces, CLARA should have been classified as a bill affecting the provinces.

Enacting legislation that affects the provinces using the correct procedure is a material part of the law-making process relating to legislation that affects the provinces. Failure to comply with the requirements of the Constitution renders the legislation invalid. The Court therefore concluded that CLARA was unconstitutional in its entirety. Given this finding, there was no need to consider the substantive validity challenges.

#### Cross-references:

##### Investigating Directorate:

- *Doctors for Life International v. Speaker of the National Assembly and Others*, Bulletin 2006/2 [RSA-2006-2-008];
- *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v. North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) *South African Law Report* 500 (CC); 2000 (4) *Butterworths Constitutional Law Reports* 347 (CC);
- *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*, Bulletin 1999/3 [RSA-1999-3-009];
- *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* [1996] ZACC 15; 1996 (4) *South African Law Report* 653 (CC); 1996 (7) *Butterworths Constitutional Law Reports* 903 (CC);
- *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996, Bulletin 1996/3 [RSA-1996-3-016].

Legal norms referred to:

- Sections 25.6, 75, 76, Schedule 4, Schedule 5 of the Constitution of the Republic of South Africa, 1996;
- Communal Land Rights Act, 11 of 2004.

*Languages:*

English.



*Identification:* RSA-2010-2-005

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 18.06.2010 / **e)** CCT 89/09; [2010] ZACC 11 / **f)** City of Johannesburg Metropolitan Municipality v. Gauteng Development Tribunal and Others / **g)** [www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT89-09](http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT89-09) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

4.8.3 Institutions – Federalism, regionalism and local self-government – **Municipalities**.

4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy**.

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods**.

*Keywords of the alphabetical index:*

Development planning, powers / Town planning, powers.

*Headnotes:*

The power to consider and approve applications for the rezoning of land and the establishment of townships (historically referred to as “town planning”) is a municipal function. The Constitution grants municipalities autonomy to exercise their constitutionally assigned functions free from interference from the national or provincial spheres of government, unless expressly provided for in the Constitution.

*Summary:*

I. A dispute between the provincial and municipal spheres of government over the proper location of the power to approve the rezoning of land and the establishment of new townships (historically referred to as “town planning”) resulted in a challenge to the constitutional validity of Chapters V and VI of the Development Facilitation Act, 67 of 1995 (hereinafter, the “Act”). The Act created “development tribunals” in each province which had the status of provincial organs of state and were empowered to perform the contested functions. This caused conflict between the tribunals and municipalities, as many municipalities performed identical functions in terms of provincial ordinances that pre-dated the Act.

The applicant, the country’s largest metropolitan municipality, argued that the contested functions fell under “municipal planning”, a function allocated to municipalities exclusively in terms of Section 156.1 of the Constitution read with Part B of Schedule 4 to the Constitution. The respondents contended that the proper depiction of these functions was within the functional area of “urban and rural development”, a concurrent competency of the national and provincial spheres listed in Part A of Schedule 4. Alternatively, they argued that the constitutionally assigned functions are not exclusive to municipalities and may be exercised by the other spheres of government.

The Supreme Court of Appeal (reversing a contrary finding of the High Court) held that the contested functions were a part of “municipal planning” and thus declared Chapters V and VI of the Act invalid as they were in conflict with the constitutional scheme. The declaration of invalidity was referred to the Constitutional Court for confirmation.

II. The Court (per Jafta J) held that the Constitution envisages a degree of autonomy for the municipal sphere, in which municipalities exercise their original constitutional powers free from interference from the other spheres of government (unless otherwise provided for in the Constitution). Furthermore, “planning” in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. Therefore, the functional area of “municipal planning” includes the contested powers. While the ordinary meaning of “urban and rural development” was capable of encompassing these powers, a restrictive interpretation of this functional area was necessary so as to respect the autonomy of the municipal sphere.

Consequently, Chapters V and VI of the Act were found constitutionally invalid and the declaration of invalidity granted by the Supreme Court of Appeal was confirmed. The Court suspended the order of invalidity for 24 months and imposed various conditions to regulate the development tribunals' powers during the period of suspension.

#### Cross-references:

- *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996, *Bulletin* 1996/3 [RSA-1996-3-016];
- *Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others*, *Bulletin* 1999/1 [RSA-1999-1-001];
- *City of Cape Town and Another v. Robertson and Another* [2004] ZACC 21; 2005 (2) *South African Law Reports* 323 (CC); 2005 (3) *Butterworths Constitutional Law Reports* 199 (CC);
- *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*, *Bulletin* 1999/3 [RSA-1999-3-009];
- *Wary Holdings (Pty) Ltd v. Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) *South African Law Reports* 337 (CC); 2008 (11) *Butterworths Constitutional Law Reports* 1123 (CC).

#### Legal norms referred to:

- Chapters V and VI of the Development Facilitation Act 67 of 1995;
- Sections 41, 100, 151, 155, 156 and 139 of the Constitution of the Republic of South Africa, 1996;
- Schedules 4 and 5 to the Constitution.

#### Languages:

English.



#### Identification: RSA-2010-2-006

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 05.08.2010 / **e)** CCT 81/09; [2010] ZACC 12 / **f)** S v. Thunzi and Another (with Minister for Justice and Constitutional Development) / **g)** www.constitutional court.org.za/uhtbin/cgisirsi/tmatAzWPo5/MAIN/0/57/518/0/J-CCT81-09 / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

1.1.4.4 Constitutional Justice – Constitutional jurisdiction – Relations with other institutions – **Courts.**

1.3.1 Constitutional Justice – Jurisdiction – **Scope of review.**

1.3.4.10 Constitutional Justice – Jurisdiction – Types of litigation – **Litigation in respect of the constitutionality of enactments.**

1.5.4.6 Constitutional Justice – Decisions – Types – **Modification.**

1.6.9.1 Constitutional Justice – Effects – Consequences for other cases – **Ongoing cases.**

5.2.2 Fundamental Rights – Equality – **Criteria of distinction.**

#### Keywords of the alphabetical index:

Constitutional Court, appeal, limits / Declaration of unconstitutionality / Law, pre-constitutional, status / Order, final, Court's power to vary.

#### Headnotes:

The ordinary course to follow when a declaration of constitutional invalidity has been incorrectly referred to the Constitutional Court by a high court, and a further part of the order requires correction, is for the matter to be referred back to the high court to correct that part of the order itself. However, in exceptional circumstances where the interests of justice demand it, the Constitutional Court can exercise its inherent power under Section 173 of the Constitution to correct the high court order.

#### Summary:

I. The High Court declaration that the “applicability” of Section 4 of the Dangerous Weapons Act 71 of 1968 (Transkei) (DWA (Tk)) was invalid was referred to the Constitutional Court for confirmation. The High Court decided that the applicability of the provision unfairly discriminates against perpetrators of crime in the erstwhile Transkei region who are subject to its harsher sentencing regime. The applicants had been convicted and sentenced to higher terms of imprisonment in terms of Section 4 of the DWA (Tk) than provided for by the Magistrates Courts Act 32 of 1944.

Under apartheid, the Transkei region was declared a “sovereign and independent state” on 26 October 1976. The Transkei adopted all legislation of the Republic of South Africa that was in force immediately prior to its independence. This included the national Dangerous Weapons Act (DWA (SA)). All laws thus adopted became separate laws of the Republic of Transkei designated with the appendage “(Transkei)”,

which is how the DWA (Tk) came into existence with identical provisions to the DWA (SA). In 1978, the national Minister of Justice issued a government notice which caused the higher penalty provisions of the DWA (SA) to cease to have effect in the Republic of South Africa. However, this notice had no effect in the “independent” Republic of Transkei. Consequently the DWA (Tk) continued to apply in the Transkei, whereas the identical provisions of the DWA (SA) no longer applied in the rest of the country.

In declaring the “applicability” of Section 4 of the DWA (Tk) to be unconstitutional, the High Court limited its order of invalidity to cases where the accused had not yet pleaded, and referred the matter to the Constitutional Court for confirmation of the declaration of invalidity.

II. The majority (per Skweyiya J) found that in declaring the “applicability” of Section 4 of the DWA (Tk) to be unconstitutional, rather than the provisions themselves, the order of the High Court was not subject to confirmation by the Constitutional Court in terms of Sections 167.5 and 172.2.a of the Constitution. However, leaving the order of the High Court intact would perpetuate an injustice against accused persons who had already pleaded in terms of Section 4 of the DWA (Tk), or who had already been sentenced under that provision, but whose appeals were still pending.

The majority observed that ordinarily a finding that a declaration of invalidity was incorrectly referred to the Constitutional Court would be the end of the matter, and the ordinary course to follow would be to refer the matter back to the High Court to correct its order to remedy an attendant injustice. However, in the exceptional circumstances of this case, the interests of justice demanded that the Constitutional Court exercise its inherent power under Section 173 of the Constitution to correct the High Court order. The Court emphasised that the Constitutional Court was well positioned to address the High Court’s order as the issue of the appropriate remedy had been extensively canvassed in argument. Moreover, insisting on a referral back to the High Court order could result in a substantial delay, and in the interim a patent injustice could ensue.

III. In a partially concurring judgment, Ngcobo CJ held that it was not appropriate for the Court to determine the basis of its interference in terms of either Sections 172 or 173 of the Constitution because, in the absence of argument on these issues, the decision on whether to remit the matter should be guided by the interests of justice. In a further concurring judgment, Yacoob J held that there was nothing improper about the High Court’s referral of

the matter to the Constitutional Court for confirmation, and that the Constitutional Court had the power to correct the order of the High Court in terms of Section 172 of the Constitution. All the judges were however in agreement regarding the order made by Skweyiya J.

#### *Cross-references:*

- *South African Broadcasting Corp (Pty) Ltd v. National Director of Public Prosecutions and Others*, *Bulletin* 2006/3 [RSA-2006-3-011];
- *Phillips and Others v. National Director of Public Prosecutions*, *Bulletin* 2005/3 [RSA-2005-3-011];
- *Parbhoo and Others v. Getz NO and Another*, *Bulletin* 1997/3 [RSA-1997-3-009];
- *S v. Pennington and Another*, *Bulletin* 1997/3 [RSA-1997-3-008].

#### Legal norms referred to:

- Section 4 of the Dangerous Weapons Act 71 of 1968;
- Sections 167.5, 172.2.a and 173 of the Constitution of the Republic of South Africa, 1996.

#### *Languages:*

English.



#### *Identification: RSA-2010-2-007*

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 24.08.2010 / **e)** CCT 05/10; [2010] ZACC 13 / **f)** Tatiana Malachi v. Cape Dance Academy International (Pty) Ltd and Others / **g)** www.constitutionalcourt.org.za/uhtbin/cgisirsi/wFaiKb zQIz/MAIN/0/57/518/0/J-CCT05-10 / **h)** CODICES (English).

#### *Keywords of the systematic thesaurus:*

5.3.5.1.2 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Non-penal measures.**

*Keywords of the alphabetical index:*

Arrest, legal grounds / Arrest, safeguards / Debt, imprisonment, prohibition / Detention for non-payment, validity / Disproportionate means / Imprisonment, for debt, principle / Venice Commission, Venice Forum.

*Headnotes:*

The procedure for arrest *tanquam suspectus de fuga* in Section 30.1 and 30.3 of the Magistrates' Courts Act 32 of 1944 is unconstitutional and incompatible with Section 12.1.a of the Constitution, in that the procedure for arrest of an alleged fleeing debtor unjustifiably limits the right to freedom and security of the person since it allows for the deprivation of freedom without just cause.

*Summary:*

I. The procedure for arrest *tanquam suspectus de fuga* in terms of Section 30.1 and 30.3 of the Magistrates' Courts Act 32 of 1944 empowers a magistrate to make an order for the arrest and detention of an alleged debtor at the instance of a creditor who is owed R40 or more and who reasonably suspects that the debtor is about to flee the country to avoid the adjudication of the dispute.

The applicant, Tatiana Malachi, a citizen of the Republic of Moldova, was recruited by her employers to work as an exotic dancer in South Africa. In terms of the employment contract, she was required to reimburse her employers certain expenditures. The applicant became dissatisfied with her employment conditions and made plans to return to Moldova. Her employers alleged that she owed them about R 100 000, and it seemed she lacked means to pay the alleged debt. Her employers were granted an order by the Magistrates' Court to have the applicant detained in terms of Section 30.1 and 30.3 of the Magistrates' Courts Act, pending the finalisation of their claim against her. She was arrested and was detained at Pollsmoor Correctional Centre for 16 days.

In pursuit of her liberty, the applicant approached the Western Cape High Court, Cape Town for an order declaring Section 30.1 and 30.3 of the Magistrates' Courts Act unconstitutional and therefore invalid. The High Court granted the order declaring these provisions inconsistent with numerous provisions of the Constitution, including the right to equality (Section 9 of the Constitution), the right to have your dignity respected (Section 10 of the Constitution), the right to freedom of movement (Section 21 of the Constitution) and the right to freedom and security of the person (Section 12 of the Constitution). In terms

of Sections 167.5 and 172.2 of the Constitution, an order of statutory invalidity by a High Court must be confirmed by the Constitutional Court of South Africa.

II. The Constitutional Court confirmed the order of the High Court on the ground that the Magistrates' Courts Act provisions infringe the Section 12.1.a right in that they deprive a person of freedom for no just cause. The Court held that the provisions attack persons who do not want to pay, as well as person who cannot pay. It held that an arrest for an alleged debt cannot be allowed in a legal system that has abolished arrest for the inability to pay a proven civil claim. Further, the Court held that arrest *tanquam suspectus de fuga* does not necessarily ensure that the payment of the alleged debt is effected. The Court concluded that the provisions are not justifiable under Section 36 of the Constitution as the provisions allowing for arrest are disproportionate.

*Supplementary information:*

The Constitutional Court conducted a survey on the detention of fleeing debtors via the "Venice Forum" of the Venice Commission.

*Cross-references:*

- *Bid Industrial Holdings (Pty) Ltd v. Strang and Another (Minister of Justice and Constitutional Development, Third Party)* 2008 (3) *South African Law Reports* 355 (SCA);
- *Coetzee v. Government of the Republic of South Africa, Bulletin* 1995/3 [RSA-1995-3-005]; *Matiso and Others v. Commanding Officer, Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) *South African Law Reports* 631 (CC); 1995 (10) *Butterworths Constitutional Law Reports* 1382 (CC).

## Legal norms referred to:

- Section 12.1.a of the Constitution of the Republic of South Africa, 1996;
- Section 30.1 and 30.3 of the Magistrates' Court Act 32 of 1944.

*Languages:*

English.



# Spain

## Constitutional Court

### Important decisions

*Identification:* ESP-2010-2-005

**a)** Spain / **b)** Constitutional Court / **c)** Full Court / **d)** 28.06.2010 / **e)** 31/2010 / **f)** Estatuto de Cataluña / **g)** *Boletín oficial del Estado* (Official Gazette), 172, 16.07.2010; [www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=9873](http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=9873) / **h)** CODICES (Spanish).

*Keywords of the systematic thesaurus:*

1.3.4.3 Constitutional Justice – Jurisdiction – Types of litigation – **Distribution of powers between central government and federal or regional entities.**

1.3.5.4 Constitutional Justice – Jurisdiction – The subject of review – **Quasi-constitutional legislation.**

1.5.4.3 Constitutional Justice – Decisions – Types – **Finding of constitutionality or unconstitutionality.**

1.5.4.4 Constitutional Justice – Decisions – Types – **Annulment.**

2.2.2.2 Sources – Hierarchy – Hierarchy as between national sources – **The Constitution and other sources of domestic law.**

3.1 General Principles – **Sovereignty.**

3.6 General Principles – **Structure of the State.**

3.8 General Principles – **Territorial principles.**

4.3.1 Institutions – Languages – **Official language(s).**

4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body.**

4.7.7 Institutions – Judicial bodies – **Supreme court.**

4.8.4.1 Institutions – Federalism, regionalism and local self-government – Basic principles – **Autonomy.**

4.8.7 Institutions – Federalism, regionalism and local self-government – **Budgetary and financial aspects.**

4.8.8.1 Institutions – Federalism, regionalism and local self-government – Distribution of powers – **Principles and methods.**

4.8.8.5.2 Institutions – Federalism, regionalism and local self-government – Distribution of powers – International relations – **Participation in international organisations or their organs.**

4.12.10 Institutions – Ombudsman – **Relations with federal or regional authorities.**

*Keywords of the alphabetical index:*

Region, power, political status / Authority, territorial, autonomous, status, powers / Autonomy, statute, procedure and reform correct / Community, autonomous.

*Headnotes:*

The power of reform of the Statutes of Autonomy is submitted to the Constitution, which is at the heart of the right to self-government of the regions of Spain.

From a constitutional perspective, there is only one Nation (the Spanish nation). Otherwise, it is legitimate to vindicate the historical rights of the territorial minorities of Spain.

The Spanish Ombudsman (*Defensor del Pueblo*) is an institution established by the Constitution for the protection of fundamental rights and public liberties. Any suppression of this guarantee is in contravention of the Constitution.

The Constitutional Court has a monopoly over the rejection of the laws that are contrary to the constitutional provisions. The Statutes of Autonomy cannot establish mechanisms of control that ignore that monopoly.

In contrast with the federal State, in the Spanish “Autonomic State” there is only one Judiciary. In the “Autonomic State” the plurality of powers finds a limit in the unity of the Judiciary.

It is not the proper role of the Statutes of Autonomy to give a general definition of the concepts and terminology deployed in the Constitution. The Statutes of Autonomy are, however, the appropriate legislation in which to set out the provisions on the institutional relations of the Autonomous Communities, the State and other public bodies.

Participation of the Autonomous Communities in the financial instruments of solidarity among regions cannot be subjected to conditions unilaterally imposed by an Autonomous Community.

The State legislature must participate in the reform of a Statute of Autonomy because it is a law that pertains to the actual organisation of the State.

*Summary:*

I. Ninety nine deputies (members of the lower chamber of the Spanish Parliament) belonging to the Popular Party of Spain (centre-right) brought an action of



unconstitutionality against the reform of the Statute of Autonomy for Catalonia approved by the Organic Law 6/2006 of 19 July 2006. In formal terms, this was a reform of the Statute of Autonomy (originally approved in 1979). However, Organic Law 6/2006 contained a completely new Statute of Autonomy. The deputies raised concerns over a number of provisions, including the basis of the autonomy, the regulation of official languages, the incorporation of a bill of rights (the original Statute of Autonomy lacked such content), the Judiciary in Catalonia, the competences of Catalonia, as well as the financial system for Catalonia and local powers in the region.

The Constitutional Court upheld most of the provisions, but declared some of them unconstitutional and imposed an interpretation on others. It also denied juridical value to certain declarations of the preamble. There were five dissenting opinions.

II. In its judgment as to the constitutionality of the new Statute of Autonomy of Catalonia, the Constitutional Court stated that Statutes of Autonomy can include content that contributes towards the performance of the constitutional function assigned to them as well as content envisaged expressly in the Constitution. These are the institutional basic rules that incorporate the basic regulation of competence of every Autonomous Community. They may not exceed the qualitative limits that separate the scope of the constituent power and the constituted powers. Although the preamble lacks normative value, it has a level of juridical value as a template for the interpretation of statutory rules. The terms “nation” and “national reality” used in the preamble of the new Statute of Autonomy of Catalonia do not have juridical interpretative effectiveness.

The Constitutional Court also defined in its judgment the scope of other terms used in the preliminary title, such as “people of Catalonia” (which is in line with the concept of democratic principle), “citizenship” of Catalonia (with reference to the subjective realm of the projection of self-government), or “historical rights” (which should not be confused with the rights of the historical territories, which are Alava, Guipúzcoa, Navarra and Vizcaya).

The definition of Catalan as “Catalonia’s own language” in the new Statute of Autonomy must not be allowed to jeopardise the balance in the constitutional system of co-official languages. Neither does it justify the statutory imposition of the preferential use of Catalan at the expense of Spanish, which is also an official language in this Autonomous Community. The new Statute of Autonomy for Catalonia includes a provision requiring knowledge of Catalan. This was restricted by the Constitutional

Court to the specific fields of education and the Civil Service. The right to linguistic choice between co-official languages established in various statutory provisions in order to guarantee citizens’ linguistic rights imposes certain duties on public authorities. The concrete definition of these duties must be assumed by the territorial power against which the rights can be exercised. The existence of a system of co-official languages in certain regions does not mean that it must be immediately implemented in state constitutional or judicial bodies. On the duty of linguistic readiness of companies, in their relations with consumers and users, the Constitutional Court accepted a projection of linguistic rights in the relations between companies and consumers. Finally, the Court stated that the constitutionality of the characterisation of Catalan as the language of education should not deprive the Spanish language of the same status.

The rights recognised by the new Statute of Autonomy of Catalonia are not fundamental rights. According to the Constitutional Court in its judgment, they are not subjective rights but mandates for action aimed at autonomous public authorities. For example, the proclamation in the new Statute of Autonomy of the right of those in the last stages of life to live with dignity does not imply recognition of euthanasia but the manifestation of the right to a dignified life, the legal status of which depends on policy development made by the regional legislature. Moreover, the assertion in the Statute about secularism in public education means that public teaching is not institutionally assigned to religious denominations.

The new Statute attributes binding effect to the opinions of the Council of Statutory Guarantees regarding bills and motions which develop statutory rights. The Constitutional Court stated in its judgment that this provision represents a decrease of political participation rights and a meddling in the Constitutional Court’s exclusive jurisdiction over the power to reject laws. On the other hand, the exclusivity of the supervisory role of administrative activity attributed to the *Sindic de Greuges* (the Catalanian Ombudsman), implies a divestment of the *Defensor del Pueblo* (Spanish Ombudsman), an institution established by the Constitution itself as a guarantee of fundamental rights.

The establishment of a list of powers for local government in the new Statute of Autonomy does not limit the power of State legislature to approve the basic legal order of local governments. The creation of the territorial figure of the *Vegueria* (a new local intermediate entity created by the Statute of Autonomy), does not deprive the province of its constitutional role as territorial division of the State.

Rather, it should be perceived as an augmentation of legally guaranteed self-government. The Constitutional Court drew a distinction in the judgment between the regulation of the *Vegueria* as the name given to the province in Catalonia or as a new local authority.

The Constitutional Court emphasised that one of the defining characteristics of the Spanish “Autonomic State”, by contrast with the federal State, is that its functional and organic diversity does not extend to the Judiciary. The Autonomic State came about as a result of its establishment in the unique Constitution of 1978 and is also limited by the existence of a unique jurisdiction. In the field of normative concretion, the unity of jurisdiction and Judiciary is equivalent to the unity of the constituent will in terms of abstraction.

The territorial structure of the State does not affect the Judiciary as a power of the State but does allow for the decentralisation of judicial services. The judgment declared certain of the provisions relating to the judiciary in Catalonia to be unconstitutional, such as those relating to the creation of the Council of Justice as a decentralised body of the General Council of the Judiciary. The constitutionality of the projections for the Supreme Regional Court, the Public Prosecutor Office or the “administration of the auxiliary services of Judiciary” was upheld, although they were qualified in scope.

Having examined the powers conferred by the new Statute of Autonomy on the *Generalitat* of Catalonia, the Constitutional Court proceeded with the correct interpretation of the concepts used by the constituent power. The Statute of Autonomy cannot provide a general definition of constitutional terms such as “basic regulation” of a matter, competence attributed by the Constitution to the State or “legislation”, as a competence of the Central State, but it can define the scope of the powers included in the competences assumed by the Autonomous Community. Most of the new statutory provisions conferring specific powers on the *Generalitat* of Catalonia were upheld. However, the provisions about regional powers over saving banks and mutual insurance companies not integrated in the social security system that include a general definition of the constitutional notion “basic regulation” were declared null and void.

The Statute of Autonomy is the appropriate legislation to set out the fundamental principles of the relationship between the Autonomous Community and the State and other public bodies, such as the European Union. The State must assume responsibility for establishing the specific conditions that allow for the participation of the *Generalitat* of Catalonia in the institutions, agencies and decision-making of the State concerning

the regional powers. This participation must preserve the rights of the State powers and respect the freedom of the State regulatory agencies.

The State has the power to regulate its own taxes, the general framework of the tax system and to define the financial powers both of autonomous communities and the state. The autonomic financing provision of the Statute of Autonomy cannot limit the capacity of institutions and multilateral agencies, neither can it impede or impair the full exercise of State powers. The transfer rates of certain taxes and the provisions about State investment in Catalonia within the Statute are not binding on Parliament.

The requirement in the new Statute of Autonomy for other Autonomous Communities to make a “similar tax effort”, as a condition for Catalonia’s contribution to levelling mechanisms was pronounced unconstitutional. Striving towards solidarity could not be detrimental to the most prosperous Autonomous Communities beyond that which was needed for the promotion of the disadvantaged Communities.

The provisions on the local Treasury and the financial supervision of local government were upheld. The power of the regional Parliament to perform complete regulation of local taxes was, however, declared unconstitutional.

Statutes of Autonomy can establish their own process of reform. The role played by the *Cortes Generales* (State Parliament) in this process will vary according to the power and institutions affected by the reform. The new Statute of Autonomy gives the State Parliament the power to call a referendum, the final necessary act to accomplish legislative will. Where the President of an Autonomous Community calls a referendum for the ratification of a new Statute of Autonomy, he does so in his capacity of ordinary representative of the State within the territory of the Autonomous Community.

### *Languages:*

Spanish.



# Switzerland

## Federal Court

---

### Important decisions

*Identification:* SUI-2010-2-001

**a)** Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 23.11.2009 / **e)** 2C\_283/2009 / **f)** GastroBern et consorts v. Executive Council of the Canton of Berne / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 136 I 29 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality**.  
3.17 General Principles – **Weighing of interests**.  
5.4.6 Fundamental Rights – Economic, social and cultural rights – **Commercial and industrial freedom**.

*Keywords of the alphabetical index:*

Public establishment, restrictions / Smoking room / Young persons, protection / Passive smoking, protection.

*Headnotes:*

Article 5 of the Federal Constitution (principles of State activity governed by law) and Article 27 of the Federal Constitution (economic freedom); protection against passive smoking, abstract review of norms.

The Bernese regulations, established by order, which prohibit the use of the main serving facility of an establishment as a smoking room, the separate provision of a serving facility (such as a buffet or bar) in a smoking room and also access to smoking rooms by persons under the age of 18, do not violate constitutional law, in particular economic freedom (grounds 3 and 4).

*Summary:*

In 2008 the Grand Council (Parliament) of the Canton of Berne enacted the Law on protection against passive smoking, aimed at protecting the population against the harmful effects of passive smoking. The Law amended the provisions of the Law on hotels

and restaurants, notably Section 27, which in its amended form prohibited smoking in indoor areas accessible to the public in establishments which require an operating licence. However, smoking was permitted in the open air and in smoking rooms, enclosed places with a separate ventilation system. In 2009 the Executive Council of the Canton of Berne brought into force the Order on protection against passive smoking and introduced new provisions in the Order on hotels and restaurants.

Acting by way of a public-law appeal, various associations and restaurateurs requested the Federal Court to annul some of the new provisions of the Order on hotels and restaurants. They claimed that the Executive Council was not authorised to adopt the contested provisions by means of an Order and that the contested provisions did not have sufficient legal basis in the Law and did not respect constitutional rights. The appellants referred firstly to the article on smoking rooms, defined as enclosed annexes to the establishment, without separate serving facilities such as a buffet or bar, while the place in which the establishment's main serving facility was situated could not serve as a smoking room. Furthermore, they challenged the provision on access to the smoking room, under which access was prohibited to persons under the age of 18.

The Federal Court dismissed the appeal.

Article 27 of the Federal Constitution guarantees economic freedom, in particular free access to a private profit-making economic activity and the free exercise of such access. The prohibition of smoking in establishments did not directly limit economic freedom; restaurateurs were still free to operate their establishments. The prohibition governed only the way in which they operated their establishments and thus represented a minor interference with economic freedom.

The Constitution of the Canton of Berne generally permitted the delegation of legislative powers to the Executive Council. The Law on hotels and restaurants allowed, in particular, restrictions to be placed on the activities of those establishments in order to protect young persons and consumers. It also authorised the Executive Council to adopt the necessary implementing provisions.

In so far as the provisions in issue were designed to protect consumers in general and young persons in particular, they complied with the aims and the framework of the cantonal legislation. They also fell within the ambit of the powers of the Cantons. The provisions of the order thus constituted a sufficient legal basis to justify the contested restrictions.

---

The appellants also disputed the proportionality of the provisions of the Order. The principle of proportionality required that State measures be an appropriate means of attaining the legal objective, that they be necessary to the aim pursued and that they not go beyond what was necessary.

Protection against passive smoking served the interests of the public and of staff. There could be no doubt that it was in the public interest and it might even justify a complete ban on smoking in restaurants. For the protection of staff and consumers, the Court upheld on similar grounds the provision prohibiting the main serving facility being in smoking rooms. The impugned provisions were without doubt an appropriate means of protecting staff against the harmful effects of smoking. They also served to protect non-smoking consumers. The prohibitions were necessary and other measures having the same effect could scarcely be envisaged. Last, the orders adopted by the Canton of Berne did not go beyond what was necessary. Given that customers were able to take a seat in the smoking rooms and be served there, which they were not permitted to do in other Cantons, the measures introduced by the Order were also proportionate within the strict meaning of the word.

Nor were the contested rules contrary to the new Federal Law on protection against passive smoking, which was to enter into force in 2010. This Law prohibits smoking in restaurants, but allows the creation of specially designed smoking areas, isolated from the other areas, designated as such and provided with adequate ventilation, in which staff can work only if they are specially authorised and consent to do so.

#### *Languages:*

German.



#### *Identification:* SUI-2010-2-002

**a)** Switzerland / **b)** Federal Court / **c)** Second Social Law Chamber / **d)** 18.01.2010 / **e)** 9C\_517/2009 / **f)** F. v. Sickness Insurance Office of the Canton of Fribourg / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 136 I 149 / **h)** CODICES (German).

#### *Keywords of the systematic thesaurus:*

4.3.1 Institutions – Languages – **Official language(s)**.  
 4.7.4.4 Institutions – Judicial bodies – Organisation – **Languages**.  
 5.2.2.10 Fundamental Rights – Equality – Criteria of distinction – **Language**.  
 5.3.13.21 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Languages**.  
 5.3.40 Fundamental Rights – Civil and political rights – **Linguistic freedom**.

#### *Keywords of the alphabetical index:*

Language, procedural document / Procedural document, official language, use.

#### *Headnotes:*

Article 70.2 of the Federal Constitution (determination of the official languages of the Cantons); Articles 6.1 and 17.2 of the Constitution of the Canton of Fribourg; freedom of language, official language and language of the procedure.

Without regard to the language of the procedure, Article 17.2 of the Constitution of the Canton of Fribourg allows a litigant to address the Cantonal Court in the official language of his or her choice, namely in German or in French. The Cantonal Court cannot require as a condition of the admissibility of an action the translation of a pleading drafted in the official language other than the language of the procedure (grounds 3 to 8).

#### *Summary:*

Following an initial procedure conducted solely in French, the Sickness Insurance Office of the Canton of Fribourg rejected F.'s claim for benefits. By a memorial drafted in German, the insured brought an action before the Social Insurance Court of the Cantonal Court of the Canton of Fribourg. In the context of the exchange of written pleadings, the Sickness Insurance Office requested that the proceedings be conducted in the language of the contested decision and requested a French translation of the document initiating the action. The insured requested that the proceedings be held in German.

The Cantonal Court held that the proceedings should be held in French, refused to derogate from the rules of the Fribourg code of procedure and administrative jurisdiction and gave the insured 30 days within which to translate her memorial into French, notifying her that otherwise it would not be taken into

consideration. The insured did not do as requested. The Cantonal Court took the view that the action was vitiated by a procedural defect and declared it inadmissible. F. lodged a public-law appeal with the Federal Court against that judgment and requested that it be set aside. The Federal Court allowed the appeal, set aside the judgment under appeal and remitted the case to the Cantonal appellate authority for a decision on the merits.

Freedom of language is expressly guaranteed by Article 18 of the Federal Constitution. That guarantee includes, in particular, the use of the mother tongue. Where that language is also one of the four national languages, its use is protected by Article 4 of the Federal Constitution. Article 8.2 of the Federal Constitution also prohibits any discrimination on the ground of language. In relations between the citizen and the authorities, the scope of the principle of freedom of language concerns more particularly the fields of the language of education and that of the official language of the Cantons, in particular the judicial language.

According to Article 70.2 of the Federal Constitution, the Cantons designate their official languages. In order to preserve harmony between the linguistic communities, the Cantons respect the traditional territorial distribution of languages and take the indigenous linguistic minorities into consideration. Article 70.2 of the Federal Constitution enshrines the principle of the territoriality of languages, which is not an individual constitutional right, but represents a restriction of freedom of language in so far as it allows the Cantons to take measures to maintain the homogeneity and traditional limits of the linguistic regions. The principles of freedom of language and territoriality may be incompatible, however, as the former protects the citizen's right to express himself or herself in his or her language, whereas the latter is designed to ensure the stability and homogeneity of the linguistic regimes.

In relations with the authorities, freedom of language is limited by the principle of the official language. In principle, there is no right to communicate with the authorities in a language other than the official language. The official language is itself linked with the principle of territoriality, in the sense that it normally corresponds with the language spoken in the territory concerned.

Subject to the limits laid down by Federal constitutional law, it is primarily for the Cantons to regulate the use of language within their borders. The use of language in the Canton of Fribourg is based on two separate provisions of the Cantonal Constitution: the principle of territoriality is enshrined in Article 6

and freedom of language in Article 17. Article 17 provides that a person who addresses an authority whose powers extend to the whole of the Canton may do so in the official language of his or her choice.

For the administrative procedure, it is the code of procedure and of administrative jurisdiction of the Canton of Fribourg that determines the language. The regulations are based on the principle of territoriality: the determining language in a case is not necessarily that of the member of the public concerned, but, in principle, the official language or languages of the district concerned. In the event of an appeal, the proceedings take place in the language of the contested decision. Where the circumstances so justify, there may be a derogation from those rules.

Freedom of language as enshrined in the Fribourg Constitution permits a person who addresses – orally or in writing – an authority whose powers extend to the whole of the Canton (for example the Cantonal Court) to do so in the official language – French or German – of his or her choice. That provision enshrines the principle of personality (also called the principle of free choice of language) and constitutes an express exception, desired by Fribourg citizens, to the general principle of territoriality.

The meaning of that guarantee seems at first sight to be unambiguous. Conversely, it does not require the authorities to deliver their decisions in both official languages of the Canton or to use the language in which the applicant has expressed himself or herself. The administrative rules of procedure, according to which the authorities are to investigate and decide in principle in the official language of the district concerned, and in the event of an appeal, in the language of the contested decision, remain wholly valid. None the less, the question arises whether the Cantonal Court can require a party to translate the written pleadings into the language of the procedure.

The long and laborious genesis of Article 17 of the Fribourg Constitution shows that while those drafting the Fribourg Constitution refused to grant the requests to make reservations for the procedural laws, they clearly expressed their intention to establish a free choice of the official language in relations with the Cantonal authorities. This principle did not formally repeal or amend the provisions of the administrative procedure. Being of constitutional rank and more recent, the constitutional provision takes precedence over the administrative rules of procedure, which must give way to the new constitutional provision. From a more general point of view, it is appropriate to state that Article 17.2 of the Fribourg Constitution is consistent with the approach taken in recent years by the Federal and Cantonal legislatures.

Article 17.2 of the Fribourg Constitution therefore authorises a litigant to file his or her memorial in appeal before the Cantonal Court in the official language of his or her choice, without regard to the language of the procedure at first instance.

*Languages:*

French.



*Identification:* SUI-2010-2-003

**a)** Switzerland / **b)** Federal Court / **c)** Second Social Law Chamber / **d)** 19.03.2010 / **e)** 9C\_99/2009 / **f)** Universa sickness fund v. B. / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 136 I 121 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

5.2.1.3 Fundamental Rights – Equality – Scope of application – **Social security**.

5.2.2.7 Fundamental Rights – Equality – Criteria of distinction – **Age**.

*Keywords of the alphabetical index:*

Sickness insurance, benefit / Medical treatment.

*Headnotes:*

Article 8.1 and 8.2 of the Federal Constitution (equality); Sections 33 and 34 of the Federal Law on sickness insurance. Conditions governing the provision of the benefit by the compulsory health care insurance.

The maximum age of 60 years laid down for surgical treatment for overweight is based on a proper medical ground and does not breach the principle of equality or the prohibition of all discrimination based on age (ground 5).

*Summary:*

B., who was born in 1940, was covered by the Universa sickness fund for compulsory health care insurance and for combined hospitalisation insurance. He presented a

state of morbid obesity and consulted Doctor R., a surgeon, who recommended the insertion of a stomach ring. According to his opinion, which was shared by a colleague, the insertion of a ring constituted the best therapeutic step and would have beneficial effects on the other adverse effects on the patient's health, while the risk of complications was limited. Dr R. informed the medical adviser to the sickness fund that his patient proposed to undergo bariatric surgery. The sickness fund informed B. that it would not pay for the proposed operation, since he was over the age of 60, which, according to the legal provisions, was the maximum age at which his costs would be covered by compulsory sickness insurance. B. none the less underwent an operation in September 2007.

By decision of 12 March 2008, which was subsequently confirmed, the sickness fund refused to pay for the operation under the compulsory health care insurance and the combined hospitalisation insurance. B. lodged an appeal against that decision before the Cantonal Social Insurance Court of the Canton of Geneva and claimed that the costs of the surgical treatment in question and the hospitalisation should be covered by his insurance fund. The court upheld the appeal and held that the insured was entitled to reimbursement of the costs.

The Universa sickness fund lodged a public-law appeal before the Federal Court; it claimed that the cantonal judgment should be set aside and that the sickness fund's decision should be confirmed. The Federal Court upheld the appeal and set aside the judgment of the Cantonal Court in so far as it held that the treatment in issue should be covered by the compulsory sickness insurance.

Compulsory health care insurance covers the costs of treatment defined in Sections 25 to 31, taking into account Sections 32 to 34 of the Federal Sickness Insurance Law. Insurers cannot cover costs other than the costs of the treatment provided for. The Federal Council delegated to the Federal Department for the Interior the power to designate the treatment to be covered by insurers. The Department promulgated the Order on treatment in compulsory sickness health care insurance (hereinafter, the "OPAS"). According to the annex to that order (in force at the material time), surgical treatment for adiposity is compulsorily covered by insurance, but the patient must not be more than 60 years old. As B. was 66 years old at the time of the operation, he did not satisfy the age criterion.

According to the Cantonal Court, the bariatric surgery undergone by the respondent was an effective, appropriate and economic measure within the meaning of the Law. The maximum age requirement

of 60 years laid down in the OPAS created unequal treatment between insured persons. As the Federal Sickness Insurance Law did not lay down that condition, the Cantonal Court accepted that the age limit laid down in the OPAS could properly be disregarded and that the applicant was entitled to reimbursement of the costs incurred in connection with the operation. The appellant insurer took issue with the first-instance court for having disregarded the Department's assessment that the maximum age of 60 years for the treatment in question was necessary, owing inter alia to the risk associated with operations, which increased significantly for persons over the age of 60, and to the fact that the higher death rate attributable to obesity tended to fall after the age of 60. The Federal Office of Public Health had expressed a similar view.

Initially, the maximum age for cover for surgical treatment for obesity by the compulsory health insurance was fixed at 50 years. That limit became less rigid and was raised to a maximum of 60 years under the provisions applicable in the present case.

When reviewing the lawfulness and the constitutionality of the orders of the Federal Council or the Federal Department for the Interior, the Federal Court is in principle empowered to examine the content of a list of diseases to be taken into consideration. None the less, it must exercise great self-restraint in that examination: on the one hand, it does not have the necessary knowledge to form an opinion on the matter without recourse to expert opinion, and, on the other hand, the order, which is frequently revised, may be corrected at short notice by the Department. Conversely, the court will freely review a provision of the order where it appears that the specialist committees have relied not on medical considerations but on general or legal assessments.

The decision to limit the patient's age to 60 years was based on the findings of various groups of experts, approved by Swiss and international specialist associations. As regards the indications concerning surgical treatment for obesity, the experts concluded that the risk associated with operations increased significantly after the age of 60, while the higher death rate attributable to obesity tended to fall after that age and to disappear after the age of 70. The recommended age for surgery is between 18 and 60. The relevant recommendations were updated in 2006.

It was thus apparent that the maximum age laid down in the OPAS was justified in the eyes of medical science. Consequently, by laying down a maximum age for reimbursement of the cost of surgical treatment for obesity, the Department could not be

criticised for having distinguished between two categories of patient other than on serious and objective grounds. The difference in treatment was based on objective and reasonable justification and thus did not contravene the principle of equal treatment according to Article 8.1 of the Federal Constitution or the prohibition of any discrimination on grounds of age according to Article 8.2 of the Constitution. The principle of non-discrimination does not prohibit any distinction based on one of the criteria listed, but serves rather as a basis on which unacceptable differentiation may be suspected. The inequalities which result from such a distinction must therefore be supported by special justification. The distinction relating to the age of 60 years is specifically based on a convincing medical ground which constitutes objective and reasonable justification.

The fund's appeal was therefore well founded and the judgment under appeal was, accordingly, set aside.

*Languages:*

French.



## “The former Yugoslav Republic of Macedonia” Constitutional Court

---

### Important decisions

*Identification:* MKD-2010-2-003

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 26.05.2010 / e) U.br.260/2009 / f) / g) / h) CODICES (Macedonian, English).

*Keywords of the systematic thesaurus:*

3.3.2 General Principles – Democracy – **Direct democracy.**

4.9.2 Institutions – Elections and instruments of direct democracy – **Referenda and other instruments of direct democracy.**

*Keywords of the alphabetical index:*

Referendum, consultative, organisation, conditions.

*Headnotes:*

Consultative referenda, the results of which are not binding on the legislator, do not contravene the Constitution.

Where the legislator stipulates a period of time during which referenda may not be held on the same matter, this is not contrary to the Constitution. It acknowledges the importance of the referenda as a form of direct expression for citizens.

*Summary:*

An NGO from Skopje asked the Court to review the constitutionality of certain articles of the Law on Referendum and Other Forms of Direct Expression of Citizens (Official Gazette, no. 81/2005). Article 8.1 of the Law covers the announcement of a referendum with a view to the citizens making a decision or for the consultation of citizens, and paragraph 3 states that a decision made in a referendum for consultation purposes is not binding. Article 19 of the Law provides that a referendum on the same matter may

not be repeated within two years of the date when the last referendum was held. Article 27 allows for the announcement of a referendum at state level for the prior consultation of citizens on matters of wider national significance.

The petitioner claimed that the disputed articles of the Law were out of line with Articles 2, 68.1.10 and 73 of the Constitution, since the Constitution defined the referendum as a form of decision-making for citizens, and a form of exercise of their power, and not as a form of consultation of the citizens for the needs of the legislative power. Therefore, decisions passed by referendum were binding for all. The petitioner also made the point that Article 73 of the Constitution does not define two types of referenda (decisive and consultative). Rather, it deals with one form of referendum with decisions of binding force. According to the petitioner, the Constitution does not rule out the possibility of a referendum on the same matter within two years of the date of the last referendum., as the Assembly cannot interfere with the citizens’ wish to express their opinion in a referendum, albeit on the same matter, in accordance with the Constitution. The Assembly cannot impose restrictions in terms of time on the will of the citizens to express their views by referendum, provided that there is a sufficient core of authorised proponents (at least 150 000 voters).

The Court based itself on Articles 2.1.2, 8.2, 61.1, 68, 73.1, 74.2 and 120.3 of the Constitution and from the Law on Referendum and Other Forms of Direct Expression of Citizens. It found the statements in the petition to be without merit. In the Court’s view, provision for a consultative referendum, in addition to a binding referendum, does not entail a violation of the constitutionally defined principle of the exercise of citizens’ authority through democratically elected representatives, through referenda and other forms of direct expression. Under the provisions of the Law, it is undisputed that a consultative referendum at state level may be announced by the Assembly for prior consultation of the citizens on matters of wider national relevance. It is also undisputed that the Assembly enjoys constitutionally defined competence to call a referendum on matters within its competence. The Assembly’s right to announce a referendum in order to consult the citizens does not in any way interfere with its right to announce a binding referendum in cases defined by the Constitution. It is not acceptable to view a binding referendum as the only method of announcing a referendum on all matters where the Assembly deems this justified. The legal nature of the institution of a referendum derives from and is characteristic of a direct democracy, in which the citizens decide directly on certain matters. The provision allowing for citizens to be consulted on certain matters of wider relevance should be

---



interpreted in this sense. The non-binding character of the decision (one which does not impose a legal but rather a moral obligation on the Assembly to act according to the will of the citizens) derives from the very nature of such referenda, namely consulting citizens to ascertain their views on certain matters. The Assembly enjoys the constitutional right to determine whether, when and how it will begin to deal with the matters on which citizens have been consulted in such a referendum. The Court did not, therefore raise the question of the constitutionality of the disputed articles of the Law.

The Court did not find contrary to the Constitution the provision of the Law prohibiting the holding of a referendum on the same matter within two years of the date of the last referendum. According to the Court, given the time required to organise a referendum, the participation of state bodies in its implementation, the determination of the results of the referendum and the funds required to hold it, when the legislator stipulated the two-year time limit, it was regulating a matter of organisational nature which gives the referendum a legitimate character and confirms the significance of the institution of referenda as a form of direct expression for citizens. The manner of conduct prescribed in this regard should not be construed as a suspension of the right to a referendum. Neither does the Law prohibit or restrict the right to issue notice for a referendum for the same matter more than once. It simply regulates the procedure for the exercise of this right.

Judge Igor Spirovski gave a dissenting opinion. He suggested the disputed articles are unconstitutional as they paid no heed to the imperative nature of Article 73.4 of the Constitution, which states that decisions made in referenda held in accordance with this Article are binding on the Assembly.

#### *Languages:*

Macedonian.



## Turkey Constitutional Court

### Important decisions

*Identification:* TUR-2010-2-002

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 04.02.2010 / **e)** E.2007/98, K.2010/33 / **f)** Concrete Review of Law no. 5176 (Law on the Establishment of the Ethics Board for Civil Servants) / **g)** *Resmi Gazete* (Official Gazette), 18.05.2010, 27585 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

5.3.1 Fundamental Rights – Civil and political rights – **Right to dignity.**

5.3.13.22 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Presumption of innocence.**

*Keywords of the alphabetical index:*

Civil servant, dignity, rights / Civil service, ethics.

*Headnotes:*

Publication in the Official Gazette of decisions by the Ethics Board for Civil Servants to the effect that ethical principles have been violated by a civil servant infringes that person's right to dignity.

*Summary:*

The Fifth Chamber of the Council of State (Supreme Administrative Court) asked the Constitutional Court to assess the compliance with the Constitution of the third paragraph of Article 5 of Law no. 5176 (Law on Establishment of the Ethics Board for Civil Servants), which regulates the decisions of the Board of Ethics of Civil Servants. According to the third paragraph, where the Board finds that a civil servant has violated ethical principles and its decision to that effect has become final, the Office of the Prime Minister will declare it as a Board decision by publishing it in the Official Gazette. If, however, the Board's decision is overturned by a court, the Board will comply with the judicial decision and publish it in the Official Gazette.

The Supreme Administrative Court argued that, whilst Ethics Board decisions can be challenged before the courts and they are not judicially final, placing them in the public arena by publishing them in the Official Gazette violates the principle of the presumption of innocence.

The Constitutional Court ruled that since Ethics Board decisions are not penal sanctions and are open to challenge before the courts, there is no infringement of the principle of the presumption of innocence. However, it also held that making public a decision that a civil servant has breached ethical principles, which is not a crime, humiliates him or her *vis à vis* the public and violates his or her right to dignity. Publication of the Court decision annulling the decision of the Board does not provide enough reparation for the civil servant who has been exposed. The contested provision does not strike a fair balance between the individual rights of the civil servants and the public interest. The Court therefore found the related parts of Article 5 of Law no. 5176 to be contrary to Articles 2 and 17 of the Constitution and unanimously overturned it.

#### *Languages:*

Turkish.



#### *Identification:* TUR-2010-2-003

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 24.03.2010 / **e)** E.2007/33, K.2010/48 / **f)** Concrete Review of Law no. 5846 (Law on Intellectual and Artistic Works) / **g)** *Resmi Gazete* (Official Gazette), 22.06.2010, 27619 / **h)** CODICES (Turkish).

#### *Keywords of the systematic thesaurus:*

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

5.4.12 Fundamental Rights – Economic, social and cultural rights – **Right to intellectual property.**

#### *Keywords of the alphabetical index:*

Art, owner, rights, limitation.

#### *Headnotes:*

Prevention of the owners of artistic works who authorised professional associations to enforce their rights from doing so on an individual basis is in breach of their right to access to court.

#### *Summary:*

The İstanbul Court for Intellectual and Industrial Property Rights asked the Constitutional Court to assess the compliance with the Constitution of Article 41.12 of Law no. 5846 on Intellectual and Artistic Works. This article states that natural or legal persons who have rights over works, performances, phonograms, productions and broadcasts which are used and/or communicated on public premises may only demand payments for such use and/or communication through professional associations to which they have given authority. It further states that the application of this provision is not compulsory for cinematographic works.

The applicant court claimed that prevention of the owners of artistic works who authorised professional associations to enforce their rights from doing so on an individual basis is in breach of their right to access to court.

The Constitutional Court ruled that the word “only” in the first sentence of paragraph 12 prevents the owners of artistic works who authorised professional associations to demand payment for the use of their work on public premises from demanding payment individually. This can only be done through professional associations. This provision therefore constitutes a limitation over the rights of owners of artistic works to access court. The Court stressed that under Article 13 of the Constitution fundamental rights can only be restricted by law and in accordance with the reasons mentioned in the relevant articles of the Constitution. Article 36 of the Constitution does not include any reason to restrict the right to access courts. The Court accordingly found the word “only” in paragraph 12 to be contrary to the Articles 13 and 36 of the Constitution and directed its repeal. Justices Mrs Kantarcioğlu, Mr Oto, Mr Apalak and Mrs Perkaş expressed dissenting opinions on the basis that the whole of the sentence should have been annulled.

#### *Languages:*

Turkish.



*Identification:* TUR-2010-2-004

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 07.07.2010 / **e)** E.2010/49, K.2010/87 / **f)** Annulment of Law no. 5982 (Law Amending Turkish Constitution) / **g)** *Resmi Gazete* (Official Gazette), 01.08.2010, 27659 (Mükerrer) / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

3.3 General Principles – **Democracy**.  
 3.9 General Principles – **Rule of law**.  
 4.1.2 Institutions – Constituent assembly or equivalent body – **Limitations on powers**.  
 4.7.5 Institutions – Judicial bodies – **Supreme Judicial Council or equivalent body**.

*Keywords of the alphabetical index:*

Constitution, amendment / Judicial review / Constitutional provision.

*Headnotes:*

The Constitutional Court has jurisdiction to review the constitutionality of laws amending the Constitution which have been submitted to public referendum before the referendum takes place. If a law amending other articles of the Constitution alters the substance of an irrevocable provision of the Constitution, the Constitutional Court has competence to review the constitutional compliance of such legislation. Constitutional amendments limiting the right to vote in the election to membership of the Constitutional Court and High Council of Judges and Prosecutors contravene the principle of a democratic state governed by the rule of law, an irrevocable provision of the Constitution.

*Summary:*

Law no. 5982 (Law amending certain articles of the Constitution) includes twenty-six articles and amends twenty-four articles of the Constitution including Articles 10, 20, 23, 41, 51, 53, 54, 74, 84, 94, 125, 128, 129, 144, 145, 146, 147, 148, 149, 156, 157, 159 and 166, as well as Provisional Article 15. It was adopted by the Turkish Grand National Assembly and published in the Official Gazette. The President of the Republic submitted the constitutional amendments to public referendum.

One hundred and eleven deputies requested a ruling from the Constitutional Court on the constitutional compliance of the amendments in terms of form and substance, arguing that the law as a whole is unconstitutional for several reasons in terms of form, and that some of the articles are contrary, in substance, to the irrevocable provisions of the Constitution. They suggested that Articles 16 and 22 of the Law which respectively amended Articles 146 and 159 of the Constitution are contrary to the irrevocable principles of separation of power and rule of law. These articles regulate the composition of Constitutional Court and High Council of Judges and Public Prosecutors respectively.

Under Article 146 of the Constitution as amended by Law no. 5982 the Constitutional Court is composed of seventeen members, three of whom are to be elected by Parliament from amongst the three nominations for each seat by heads of bar associations (one member) and the Court of Accounts (two members). Fourteen members will be elected by the President of the Republic, four of them directly without any nominations and ten of them from amongst three nominations for each seat by the Court of Cassation (three members), the Council of state (two members), the Military Court of Cassation (one member), the High Military Administrative Court (one member) and the Council of Higher Education (three members). Under this provision, each elector will vote for only one candidate in the nomination elections, and the three candidates who receive the highest votes will be nominated.

Under Article 159 of the Constitution as amended by Law no. 5982 the High Council of Judges and Prosecutors is composed of 22 regular and 12 substitute members. The Minister of Justice and his Under Secretary will sit as *ex officio* members. Four members of the High Council are to be elected by the President of the Republic directly from amongst professors of law, economics and political sciences, lawyers and high ranking public officials. The remaining members will be elected directly by judges and prosecutors (Court of Cassation three regular and three substitute members, the Council of State two regular and two substitute members, Justice Academy one regular and one substitute members, judges and prosecutors seven regular and four substitute members and administrative judges and prosecutors three regular and two substitute members). Under this provision, each elector will vote for only one candidate in the elections, and the candidates who receive the highest votes will be elected.

Article 148 of the Constitution only allows for the examination and review of constitutional amendments in respect of their form. The review of constitutional amendments is restricted to assessment as to whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was observed.

It does not bestow the Constitutional Court with the competence to review the constitutionality of constitutional amendments in terms of their substance.

The Constitutional Court ruled as a preliminary issue that it has competence to review constitutional amendments which have been submitted to public referendum before the referendum takes place. Justices Mr Yıldırım and Mr Necipoğlu put forward dissenting opinions on this point on the basis that until public approval is obtained, there is no law in force which can be reviewed.

The Constitutional Court then rejected the claims of unconstitutionality on the basis of form, finding them to be unfounded. Then, following the reasoning in Decision E.2008/16, K.2008/116, it ruled that under Article 148 of the Constitution, it has competence to review whether the requisite majority was obtained to propose a constitutional amendment. This competence includes the review of the competence of those proposing a constitutional amendment. Article 4 of the Constitution prohibits the proposal of amendments to the first three articles of the Constitution. Parliament therefore had no power to propose such an amendment. The Court accordingly decided that it was within its jurisdiction to examine whether a constitutional amendment directly or indirectly changed the irrevocable provisions of the Constitution. President Mr Kılıç, Justices Mr Kaleli, Mr Yıldırım and Mr Necipoğlu expressed dissenting opinions on this point, arguing that the Constitution did not allow the Constitutional Court to review constitutional amendments with regard to their substance and such a decision could not be made without substantive review.

In its ruling as to substance, the Court rejected most of the claims of unconstitutionality. However, it overturned provisions relating to voting both in the nomination of members of the Constitutional Court and in the election to membership of the High Council of Judges and Prosecutors. The Court ruled that these provisions undermined the right to vote, as they only permitted electors to vote for one candidate, although more candidates or members would be elected. It found this situation to be contrary to the principle of democratic state governed by the rule of law and therefore directed the repeal of phrases requiring electors to cast a vote for one candidate

only. It also directed the repeal of phrases empowering the President to elect members of the High Council of Judges and Prosecutors from amongst university professors of economics and political sciences and high ranking public officials on the ground that this had the potential to undermine the principle of judicial independence and to be in breach of the principle of rule of law.

*Languages:*

Turkish.



# Ukraine

## Constitutional Court

### Important decisions

*Identification:* UKR-2010-2-005

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.06.2010 / **e)** 15-rp/2010 / **f)** Concerning the official interpretation of Article 5.5 of the Law on the privatisation of the State housing stock (case on the privatisation of housing free of charge) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 52/2010 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

4.10.8.1 Institutions – Public finances – Public assets – **Privatisation.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

*Keywords of the alphabetical index:*

Privatisation, procedure, state-owned housing.

*Headnotes:*

Concerning the right of citizens to privatisation of the state-owned housing stock free of charge, the privatisation of total floor space in more than one apartment (or house) in the state-owned housing stock within the limits of the set sanitary norm and the nominal value of a housing certificate is not considered to be repeat privatisation.

*Summary:*

Ukraine is a social, law-based state in which the human being, his or her life and health, honour and dignity, inviolability and security are recognised as the highest social value; human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State in the social sphere (Articles 1 and 3 of the Constitution).

The right to housing is one of the constitutional rights of citizens. The guarantees for realisation of this right

are the obligation of the State to create conditions that enable every citizen to build, to purchase as property or to rent housing, and the provision of housing according to the law by the State or local self-government free of charge or at an affordable price (Article 47.1 and 47.2 of the Fundamental Law).

The rights and freedoms of human beings are also set out in the international treaties which, if agreed to be binding by the Parliament (*Verkhovna Rada*), are part of national legislation (Article 9.1 of the Constitution). The Universal Declaration of Human Rights of 1948 envisages the right of every human being to a standard of living adequate for the health and well-being of himself and his family. The Declaration includes housing, in particular, as part of the adequate standard of living (Article 25.1 of the Universal Declaration). The same provision is found in Article 11.1 of the International Covenant on Economic, Social and Cultural Rights of 1966, which was ratified by Decree of the Presidium of the Parliament of the Ukrainian Soviet Socialist Republic no. 2148-VIII of 19 October 1973. The International Covenant provides for, among others, the obligation of States – Parties to the Covenant to take appropriate steps to ensure the realisation of this right.

Thus, the right of a human being to housing is generally recognised. Pursuant to the Constitution, this right – as well as other constitutional rights – is inalienable, inviolable and equal for all without any restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics (Article 24.1 and 24.2). It shall not be abolished or restricted except in cases provided for by the Constitution (Articles 22.2 and 64.1 of the Fundamental Law).

One of the fundamentals of the legal system is the recognition and functioning of the principle of the rule of law. The Constitutional Court in Decision no. 15-rp/2004 of 2 November 2004 specifies that the rule of law requires it to be observed by the State in law-making and law enforcement activities, in particular, in laws, which by their essence are to be suffused above all with the ideas of social justice, freedom, equality etc. (paragraph 2 of item 4.1 of the reasons).

According to Article 8.2 of the Fundamental Law, laws and other normative legal acts are to be adopted on the basis of the Constitution and shall conform to it.

The Law of 1992 on the privatisation of the state housing stock (hereinafter, the “Law”) sets out that privatisation of housing is one of the means of transferring it into ownership (private property). The

purpose of the privatisation of the state housing stock is to create the conditions for the exercise of citizens' right to the free choice of means to satisfy their housing needs, the participation of citizens in the maintenance and preservation of existing housing, and the formation of market relations (preamble to the Law).

According to the Law, the privatisation of the state-owned housing stock is effected by way of its alienation by means of a transfer free of charge to citizens of apartments (or houses), or rooms in residential hostels – on the basis of the sanitary norm [the amount of space required to meet minimum public health standards], which envisages 21 square meters of total floor space per tenant and every member of his or her family and an additional 10 square meters per family – as well as the sale of redundant total floor space of apartments (or houses) to the citizens who live there or who are on a list of people in need of improvement of their living conditions (Articles 1.1 and 3.1).

The use of the above-mentioned sanitary norm for privatisation without payment of accommodation is a legislative guarantee by the State to provide for a fair transfer of the state-owned housing stock to citizens on equal conditions and in equal proportion.

With the entry into force of the Constitution, the above-mentioned provision of the Law directly implements the constitutional requirement of equality of citizens before the law; it does not allow for discrimination between citizens on the basis of the floor space of accommodation (belonging to the state-owned housing stock) in which they resided at the time of privatisation; and it secures the constitutional guarantee of the realisation of the right to housing by means of transferring it into ownership (private property) (Articles 24.1 and 47.1 of the Fundamental Law).

According to the Law, the privatisation of the state-owned housing stock is realised by means of the use of privatisation housing certificates by all citizens. Citizens are granted the right to change the designated purpose of these certificates, so they can also be used for the privatisation of part of property of state-owned enterprises and land (Article 4.1.1 of the Law).

The above-mentioned provision of the Law gives reason to conclude that the privatisation of the state-owned housing stock is not an obligation of citizens, but a right which is to be realised at their own discretion on the conditions, in the order of, and in the manner provided for by law.

In accordance with Article 5 of the Law, the condition upon which a transfer without payment is to be made of an apartment (or a house) which is the subject of privatisation to a tenant and the members of his or her family is the conformity of total floor space of the apartment (or house) to the norm set out by paragraph 2 of Article 3.1 of the Law (Article 5.1.1). Where the total floor space is less than the space which the family of a tenant has a right to obtain free of charge, the tenant and members of his or her family are issued with housing certificates, whose amount is based on the missing space and cost per one square meter (Article 5.2). Where the total floor space of the apartment (or house) exceeds the space which the family of a tenant has a right to obtain free of charge, the tenant may make an additional payment with securities received for the privatisation of state-owned enterprises or land, or if he or she does not have any, then he or she must make a payment in money (Article 5.3). In this way, free privatisation of the state-owned housing stock is conditioned on the total floor space of the apartment (or house) in which a tenant and members of his or her family permanently reside, the sanitary norm of the total floor space subject to privatisation, and is not limited with respect to the number of apartments (or houses) of the state-owned housing stock as long as the amount of total floor space meets the above-mentioned sanitary norm. Thereby citizens have a right to fully use housing certificates for the privatisation of the state-owned housing stock regardless of whether or not the total floor space of one or more apartments (or houses) meets the sanitary norm. In other words, if space of the occupied apartment (or house) is less than the sanitary norm, then the citizen has a right to use the remainder of the housing certificate for the privatisation of another apartment (or house) of the state-owned housing stock which he rents or part of the property of state-owned enterprises and land (Article 4 of the Law).

The right of a citizen to the privatisation of the state-owned housing stock is considered to be realised once in full if he or she has fully used the nominal value of a housing certificate and a total space of housing which does not exceed the set sanitary norm has been transferred into his or her private property irrespective of whether this space corresponds to one or more apartments (houses).

Consequently, the housing certificates for privatisation of the state-owned housing stock are considered to be used in full if a total floor space of an apartment (or a house) based on the sanitary norm of 21 square meters per tenant and every member of his or her family and an additional 10 square meters per family has been transferred free of charge into the private

property of a tenant and every member of his or her family. In exactly the same way a housing certificate has been used in full once when what remains of it after free privatisation of accommodation whose total floor space is less than the sanitary norm is used for the purchase of part of the property of state-owned enterprises and land (Articles 4 and 5.2 of the Law) or the whole of the housing certificate is used for privatisation of part of the property of state-owned enterprises and land. Thereby the only full use of housing certificates amounts to the one time realisation of the right to privatisation of housing free of charge envisaged by Article 5.5 of the Law.

#### Languages:

Ukrainian.



#### Identification: UKR-2010-2-006

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 17.06.2010 / **e)** 2-v/2010 / **f)** Concerning the conformity (compatibility) of the draft law introducing amendments to the Constitution (concerning the terms of authority of the Parliament of the Autonomous Republic of Crimea, local councils, and village, settlement and city heads) with Articles 157 and 158 of the Constitution (case on introducing amendments to Articles 136 and 141 of the Constitution) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 56/2010 / **h)** CODICES (Ukrainian).

#### Keywords of the systematic thesaurus:

1.2.5 Constitutional Justice – Types of claim – **Obligatory review**.  
 1.3.2.1 Constitutional Justice – Jurisdiction – Type of review – **Preliminary / ex post facto review**.  
 1.3.4.4 Constitutional Justice – Jurisdiction – Types of litigation – **Powers of local authorities**.

#### Keywords of the alphabetical index:

Constitution, amendment, validity / Constitution, amendments, proposal, constitutional review / Election, date, parliamentary decision.

#### Headnotes:

The draft law introducing amendments to the Constitution concerning the terms of authority of the Parliament of the Autonomous Republic of Crimea, local councils, and village, settlement and city heads are compatible with the Constitution except for the provisions establishing a fixed date for the elections of bodies and officials of local self-government, as well as the termination of their authority.

#### Summary:

I. In accordance with Resolution no. 2002-VI of 1 April 2010 on placing on the agenda of the 6<sup>th</sup> session of the Parliament (*Verkhovna Rada*) of the sixth convocation the draft law introducing amendments to the Constitution (concerning terms of authority of the Parliament of the Autonomous Republic of Crimea, local councils, and village, settlement and city heads) and the submission of the draft law to the Constitutional Court (hereinafter, the “Resolution”), the Parliament filed an application to the Constitutional Court for an opinion concerning the conformity (compatibility) of the draft law with Articles 157 and 158 of the Constitution.

II. The Constitutional Court indicates that this is the first time the Court has considered the issue of the compatibility of the draft law with Articles 157 and 158 of the Constitution.

Item 3 of the Resolution indicates that the issue concerning the adoption of the draft law is to be placed on the agenda of the regular (7<sup>th</sup>) session of the Parliament of the sixth convocation, which means that the Parliament of the sixth convocation has not amended the provisions of Articles 136.1, 141.1 and 141.2 of the Constitution.

Thus, this part of the draft law is compatible with Article 158 of the Constitution.

The amendments to Article 136.1 of the Constitution envisage establishing the constitutional framework for elections and a five-year term of authority (term of parliament) for the *Verkhovna Rada* of the Autonomous Republic of Crimea.

The amendments to Article 141.1 of the Constitution envisage establishing a five-year term of authority for councils of villages, settlements, cities, districts and oblasts instead of the current five-year term of office for deputies of the respective councils, while the amendments to Article 141.2 envisage a five-year term instead of the current four-year term for village, town and city heads.

In considering the amendments envisaged in the draft law to the current wording of Articles 136.1, 141.1 and 141.2 of the Constitution (concerning the establishment of a five-year term of the Parliament of the Autonomous Republic of Crimea, councils of villages, towns, cities, districts and oblasts, whose deputies are elected in regular elections, and village, town and city heads elected in regular elections), the Constitutional Court recalls that its Decision no. 13-rp/2009 of 4 June 2009 determined that the terms of authority of all representative bodies are of a general nature and the calculation of these terms is the same, regardless of whether the members of a representative body or an official is elected in regular or early elections. The same decision provides that exceptions from the constitutional provisions setting out the terms of representative bodies, may only be established by the introduction of the appropriate amendments to the Fundamental Law. In that connection, the introduction of amendments by the draft law to the system of calculation of terms of authority of representative bodies or officials depending on the type of local elections (regular, early, repeat, mid-term or first-time) is fully compatible with the legal positions mentioned above.

Thus, the Constitutional Court deems that this part of the draft law is compatible with Article 157 of the Constitution.

The Constitutional Court finds that the amendments proposed in the draft law to Articles 136.1, 141.1 and 141.2 of the Constitution are not aimed at the liquidation of the independence or violation of the territorial indivisibility of Ukraine. As of the date of this opinion, there is no martial law or state of emergency in the state.

Thus, this part of the draft law is compatible with Article 157 of the Constitution.

Moreover, the draft law contains final and transitional provisions (Chapter II).

Item 1 of Chapter II of the draft law establishes the order of its entering into force and is an inalienable part; therefore, it is compatible with Articles 157 and 158 of the Constitution.

Items 2, 3 and 4 of Chapter II "Final and Transitional Provisions" of the draft law envisage that the legislator determines a single date of voting for regular elections of councils of villages, settlements, cities, city districts (where created), districts and oblasts, and village, settlement, and city heads – 27 March 2011 – and the general order of termination of authority of councils of villages, settlements, cities, city districts (where created), districts and oblasts,

and village and settlement heads elected in regular elections on 26 March 2006, as well as in early, first time, repeat and mid-term elections during the period starting from March 2006 and ending with the date of regular elections on 27 March 2011.

Thus, when the legislator regulates legal relations in the sphere of the termination of authority of village, settlement and city heads in items 2, 3 and 4 of Chapter II "Final and Transitional Provisions" of the draft law, the legislator proceeds from a five-year term of office, which is envisaged in paragraph 3 of Chapter I.2 of the draft law, even though the Constitution sets out that their term of office is four years (Article 141.2).

The legal position of the Constitutional Court in Decision no. 14-rp/2009 of 10 June 2009 is that the terms of elections are an important safeguard for the realisation of citizens' electoral rights, and the cancellation of elections for bodies of local self-government or deferring elections on the basis of grounds not provided for by law is a violation of those rights (paragraph 3 of item 5 of the reasons).

Thus, items 2, 3 and 4 of Chapter II "Final and Transitional Provisions" of the draft law are incompatible with Article 157.1 of the Constitution.

The Constitutional Court considers that the legislator's regulation of legal relations concerning the date of voting for elections of bodies and officials of local self-government as well as the termination of their authority must be executed in accordance with Articles 85.1.30, 91 and 92.1.20 of the Constitution, that is to say, only after the introduction of amendments proposed to it by means of the adoption of a separate legal act – not a draft-law, as envisaged by Chapter XIII "Introduction of Amendments to the Constitution" of the Fundamental Law.

#### *Languages:*

Ukrainian.





*Identification: UKR-2010-2-007*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 29.06.2010 / **e)** 17-rp/2010 / **f)** Concerning the compatibility with the Constitution (constitutionality) of paragraph 8 of Article 11.1.5 of the Law on Police / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 49, 52/2010 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

3.22 General Principles – **Prohibition of arbitrariness.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.5.1.1 Fundamental Rights – Civil and political rights – Individual liberty – Deprivation of liberty – **Arrest.**

*Keywords of the alphabetical index:*

Freedom, deprivation / Detention, lawfulness / Arrest for vagrancy, not an offence.

*Headnotes:*

Arrest shall not be considered justified in any case where the acts a detainee is accused of cannot be qualified as or were not considered by law to be a violation of law at the time those acts were carried out.

*Summary:*

I. The Authorised Human Rights Representative of the Parliament (*Verkhovna Rada*) applied to the Constitutional Court for a declaration that the provisions of paragraph 8 of Article 11.1.5 of the Law on Police (Law no. 565-XII of 20 December 1990, as amended; hereinafter, the “Law”) were unconstitutional in that those provisions permit the police to arrest persons suspected of vagrancy and to detain them in special detention facilities – for a period up to 30 days with a reasoned court decision.

II. Ukraine is a democratic, law-based state; the human being, his or her life and health, honour and dignity, inviolability and security are recognised as the highest social value; human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State, which is answerable to the individual for its activity; affirmation and ensuring of human rights and freedoms is the main duty of the State (Articles 1, 3.1 and 3.2 of the Constitution).

The principle of the rule of law is recognised and effective (Article 8.1 of the Fundamental Law).

One of the elements of the rule of law is the principle of legal certainty, according to which the restriction of fundamental human and citizens rights and implementation of these restrictions are acceptable only on condition of ensuring the foreseeability of the application of the legal rules established by these restrictions. In other words, the restriction of any right should be based on criteria which provide a person with the possibility of distinguishing lawful behaviour from unlawful behaviour and foreseeing the legal consequences of his or her behaviour.

Pursuant to Article 29 of the Constitution, every person has the right to freedom and personal inviolability (Article 29.1); no one shall be arrested or held in custody other than pursuant to a reasoned court decision and only on the grounds and in accordance with a procedure established by law (Article 29.2); in the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours (Article 29.3).

The provisions of Article 29 of the Constitution define detention, arrest and holding a person in custody as measures of enforcement, which restrict the right to freedom and personal inviolability of a person and which may be applied only on the grounds and in accordance with a procedure established by law.

The Constitutional Court holds that the words “only on the grounds and in accordance with a procedure established by law” envisage the obligation of state bodies and their officials to ensure compliance with the rules of both substantive and procedural law during arrest.

The above-mentioned means that a detained person has a right to have a competent court examine not only compliance by state bodies and their officials with rules of procedural law of the grounds for arrest, but also the basis of the suspicion which constituted the grounds for arrest, the lawfulness of its enforcement, and whether it was necessary and justified in the particular circumstances.

Arrest shall not be considered justified in any case where the acts a detainee is accused of cannot be qualified as or were not considered by law to be a violation of law at the time those acts were carried out.

The impugned provision of the Law permits police to arrest persons who are suspected of vagrancy and to detain them in special detention facilities – for a period up to 30 days with a court decision.

This provision means that the objective of such an arrest is to ascertain the involvement of a person in vagrancy, that is to say, of committing a crime or another violation of law. Such an arrest was subject to the condition of criminal responsibility for such acts under the 1960 wording of Article 214 of the Criminal Code. The components of the crime defined by this article were decriminalised by Law no. 2547-XII of 7 July 1992 amending and supplementing the Criminal Code, the Ukrainian SSR Code of Criminal Procedure and the Ukrainian SSR Code on Administrative Offences.

According to Article 92.1.22 of the Constitution, the principles of civil legal liability; acts that are crimes, administrative or disciplinary offences, and liability for them shall be determined exclusively by the laws.

The Criminal Code provides that the criminality of acts, as well as their punishment and other criminal legal consequences are determined exclusively by this code (Article 3.3). An analysis of the provisions of the Code shows that it does not identify vagrancy as an action injurious to the public or provide for responsibility for its perpetration.

Nor does the Code of Administrative Offences or any other law define vagrancy as a violation of law.

The impugned provision of the Law establishes only the grounds for arrest. The Law does not set out the content or signs of vagrancy. Nor does the Law set out sufficiently accessible, clearly-worded procedures for its enforcement, that is to say, procedures which would be capable of preventing the arbitrary arrest of persons on suspicion of vagrancy. This does not conform to the principle of legal certainty.

An analysis of the rules of the Code of Criminal Procedure, in particular, Articles 106, 115, 149 and 165<sup>2</sup>, and the Code of Administrative Offences (Articles 260, 261, 262 etc.) taken together with the consideration that vagrancy is not determined by the laws to be a crime or an administrative offence, gives grounds for concluding that these rules do not envisage procedures for or the consideration by courts of issues concerning the arrest of persons on suspicion of vagrancy.

For the reasons mentioned above, the Constitutional Court considers that the provisions of paragraph 8 of Article 11.1.5 of the Law are not compatible with

Articles 8.1, 29.1, 29.2, 29.3, 55.2 and 58.2 of the Fundamental Law.

Pursuant to the Constitution, everyone who is legally present on the territory is guaranteed freedom of movement, free choice of place of residence, and the right to freely leave the territory, with the exception of restrictions established by law (Article 33.1).

The relevant provisions of the Constitution and international legal acts are further developed and specified in Law no. 1382-VI of 11 December 2003 on freedom of movement and free choice of place of residence (hereinafter, "Law no. 1382"). In particular, Article 2 of Law no. 1382 provides for the guarantee of freedom of movement and free choice of place of residence, while Articles 12 and 13 define the persons whose freedom of movement and free choice of place of residence are limited.

The above-mentioned articles of Law no. 1382 do not provide for the restriction of the right to freedom of movement and free choice of place of residence of a person suspected of vagrancy.

Proceeding from foregoing, the Constitutional Court holds that the provisions of paragraph 8 of Article 11.1.5 of the Law are not compatible with Article 33.1 of the Constitution.

Examining the issue raised in the present constitutional petition, the Constitutional Court declares – on the grounds mentioned above – that the provisions of Article 11.1.11 of the Law (which permit the police to photograph, make audio recordings of, film, make video recordings of, and fingerprint persons arrested on suspicion of vagrancy) are incompatible with the Constitution. It is for this reason that that Article is considered unconstitutional under Article 61.3 of the Law on the Constitutional Court.

#### *Cross-references:*

Judgments of the European Court of Human Rights:

- *Yeloyev v. Ukraine*, 06.11.2008;
- *Novik v. Ukraine*, 18.12.2008;
- *Soldatenko v. Ukraine*, 23.10.2008;
- *Nikolay Kucherenko v. Ukraine*, 19.02.2009.

#### *Languages:*

Ukrainian.



*Identification:* UKR-2010-2-008

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 08.07.2010 / **e)** 18-rp/2010 / **f)** Concerning the official interpretation of Article 293.1.12 of the Code of Civil Procedure in conjunction with Article 129.3.2 and 129.3.8 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 72/2010 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

4.7.2 Institutions – Judicial bodies – **Procedure.**

4.7.8.1 Institutions – Judicial bodies – Ordinary courts – **Civil courts.**

5.3.13 Fundamental Rights – Civil and political rights – **Procedural safeguards, rights of the defence and fair trial.**

*Keywords of the alphabetical index:*

Code, civil procedure / Appeal, right.

*Headnotes:*

It is the duty of the state to guarantee human rights and freedoms, which are protected by the Court and everyone is guaranteed access to the Court to challenge decisions, actions or omissions by bodies of state power, local self-government, officials and officers. An individual's right to a judicial remedy may also be exercised by challenging the acts of first instance courts through an appeal.

*Summary:*

I. The applicant, Mr Ivan I. Slobodianiuk, applied for official interpretation of Article 293.1.12 of the Code of Civil Procedure (hereinafter, the "CCP") regarding the possibility of appealing against rulings of first instance courts explaining court decisions and against rulings of first instance courts refusing to explain court decisions, in conjunction with Article 129.3.2 and 129.3.8 of the Constitution. In his view, in some cases, courts have heard appeals against rulings in which courts have refused to give explanations of court decisions, while in other cases, courts have declared such appeals inadmissible.

The applicant states that this uncertainty has resulted in the violation of his constitutional rights and freedoms. A refusal without reasons to explain unclear provisions of a court decision which has entered into legal force makes its enforcement *de facto* impossible.

II. The Fundamental Law prescribes that human rights and freedoms and their guarantees determine the essence and orientation of the activity of the state, whose primary duty is their ensuring and affirmation (Article 3.2); human and citizens' rights and freedoms are protected by the Court (Article 55.1); and, everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers (Article 55.2).

An individual's right to a judicial remedy may also be exercised by challenging by appeal the acts of first instance courts, since the review of those acts guarantees a restoration of the violated human and citizen's rights. Thus, the right to challenge court decisions by appeal in the context of Articles 55.1, 55.2 and 129.3.8 of the Constitution is a constituent element of the right to a judicial remedy in accordance with law.

The state's ensuring of the right to challenge judicial acts by appeal is one of the core principles of judicial proceedings under Article 129.3.8 of the Constitution. This constitutional provision is developed in Chapter 1, Part V of the CCP, which sets out rules for appeals against judicial decisions and rulings. In particular, Article 293 of the CCP provides a list of rulings of first instance courts which may be challenged (appealed) independently of the court decision.

The Constitutional Court has previously examined Article 293 of the CCP in conjunction with Article 129.3.8 of the Constitution and expressed its legal position regarding the possibility bringing an appeal against court rulings where the law contains no direct prohibition of such appeal (Decision no. 3-rp/2010 of 27 January 2010 and Decision no. 12-rp/2010 of 28 April 2010).

Article 221.1 of the CCP provides for proceedings for an explanation of a court decision if its content is not clear for the persons involved in the litigation or the state enforcement officer. On a motion submitted in accordance with Article 221.2, the Court renders an explanation by adopting a ruling.

The special feature of a ruling explaining a court decision or a ruling refusing to explain a court decision is that the Court may adopt it any time until the restrictions mentioned in Article 221.2 of the CCP come into existence, in particular, after the decision enters into legal force. This eliminates the possibility of appeals being brought against the ruling and the decision at the same time. Therefore, such rulings may be challenged independently. The procedure for bringing an appeal against court rulings in order to realise the right provided for by Article 221 of the CCP is established in Article 293.1.12 without any restrictions.

For the reasons mentioned above, the Constitutional Court concludes that rulings explaining court decisions and rulings refusing to explain court decisions are both subject to appeal. Denial of this possibility may lead to the infringement of the constitutional principles of judicial proceedings – equality before the law and court of all participants in court proceedings and ensuring the possibility of challenging court decisions by appeal (Article 129.3.2 and 129.3.8 of the Constitution).

#### *Languages:*

Ukrainian.



## United Kingdom Supreme Court

### Important decisions

*Identification:* GBR-2010-2-002

**a)** United Kingdom / **b)** Supreme Court / **c)** / **d)** 30.06.2010 / **e)** / **f)** R (Smith) v. Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening) / **g)** [2010] UKSC 29 / **h)** [2010] 3 *Weekly Law Reports* 223; CODICES (English).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 Sources – Categories – Written rules – International instruments – **European Convention on Human Rights of 1950.**

2.1.3.1 Sources – Categories – Case-law – **Domestic case-law.**

2.1.3.2.1 Sources – Categories – Case-law – International case-law – **European Court of Human Rights.**

5.1.1.1.1 Fundamental Rights – General questions – Entitlement to rights – Nationals – **Nationals living abroad.**

5.3.2 Fundamental Rights – Civil and political rights – **Right to life.**

*Keywords of the alphabetical index:*

Armed Force, use, abroad / Jurisdiction, territorial.

*Headnotes:*

Article 1 ECHR was, unlike its other articles, not to be construed as a living document. Jurisdiction under the Article was territorial in nature. Where jurisdiction was extended beyond that it could only be done so through special justification in particular circumstances. Jurisdiction under the article did not extend to cover a contracting state's armed forces when they were deployed outside an army base in a foreign territory. The Court could not go beyond the extant jurisprudence on the territorial ambit of Article 1 ECHR. It was for the European Court of Human Rights (the Strasbourg Court) to determine the question whether a contracting state's armed forces

fell within a state's jurisdiction as a consequence of their personal status.

### Summary:

I. Private Smith had been on active military service in Iraq for two months when he died of hyperthermia. He suffered hyperthermia while carrying out duties off his army base, although he died whilst on the base. An inquest into his death was carried out, and found that he had died as a consequence of there having been a serious failure to deal with the difficulties Private Smith had experienced in adjusting to the temperature in Iraq. Private Smith's mother issued judicial review proceedings seeking an order quashing the Inquest's verdict and a fresh inquest. She submitted that the United Kingdom owed her son a duty under Article 2 ECHR. The High Court held that Private Smith was protected by Article 2 ECHR at all times when he was in Iraq. The Court of Appeal upheld that decision on the ground that Article 1 ECHR applied to UK armed forces personnel at all time they were in Iraq. The Supreme Court, by a majority, allowed an appeal by the Secretary of State.

II. Lord Phillips PSC, with whom all the majority members of the Court agreed, gave the leading judgment.

The Secretary of State submitted that while Private Smith was within the United Kingdom's jurisdiction when he was within the armed force's base in Iraq, as this was territory within the UK's effective control, he was not within its jurisdiction when he was outside the base. It was submitted on Private Smith's behalf that he was within the scope of Article 1 ECHR because he was at all times under the UK's jurisdiction in national and international law. He was, not because of where he was at any one time, but because of his personal status as a member of the UK armed forces; as such he was subject at all times to UK jurisdiction. On behalf of the intervener, the Equality and Human Rights Commission, it was submitted that Private Smith fell under the scope of Article 1 ECHR not because of his location at any particular time, but rather because of the reciprocal rights and obligations of nationals and their state wherever they might happen to be.

In his judgment Lord Phillips first noted that the Strasbourg Court in *Bankovic v. United Kingdom* (2001) 11 *Butterworth's Human Rights Cases* 435 had recognised that while jurisdiction for the purposes of Article 1 ECHR was primarily territorial, it was not limited to territory over which a state exercised lawful control. It extended beyond that in exceptional circumstances which required special justification. It was however unlikely that the contracting states to

the ECHR would, in 1951, have contemplated that Article 2 would have applied to armed forces abroad i.e., that Article 1 ECHR would extend to such circumstances. It was not for the Supreme Court to go beyond the scope of existing Strasbourg jurisprudence in this regard. It was for the Strasbourg court to resolve the issue whether a state's armed forces, as a consequence of their personal status, fell within a contracting state's jurisdiction for the purposes of Article 1 ECHR.

In a dissenting judgment, Lord Mance held that the United Kingdom had jurisdiction over its armed forces in Iraq for the purposes of Article 1 ECHR. The UK was an occupying power in Iraq, and as such had complete control of its armed forces and had in international law absolute power regarding their safety. The relationship between the UK and its armed forces was not territorial but was rather based on a reciprocal bond of authority and control on one hand and allegiance and obedience on the other. In his view the Strasbourg Court would hold that Article 1 ECHR applied to the present situation.

In a further dissent, Lord Kerr agreed with Lord Phillips that the Strasbourg court's case law had not yet recognised a general principle that jurisdiction arises for the purposes of Article 1 ECHR wherever a state exercised legislative, judicial or executive authority in a way which effects an individual's ECHR rights irrespective of whether the individual is or is not within the state's territory. However, he concluded that the Strasbourg Court had however recognised in *Issa v. Turkey* 41 *European Human Rights Reports* 467 at [71] that jurisdiction over individuals for the purposes of the ECHR where a state has complete control over a citizen of the state irrespective of whether the citizen is in a location which is under the effective control of that state.

### Languages:

English.



# United States of America

## Supreme Court

### Important decisions

*Identification:* USA-2010-2-001

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 21.01.2010 / **e)** 08-205 / **f)** Citizens United v. Federal Elections Commission / **g)** 130 *Supreme Court Reporter* 876 (2010) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

1.6.3.1 Constitutional Justice – Effects – Effect erga omnes – **Stare decisis**.

4.9.8.2 Institutions – Elections and instruments of direct democracy – Electoral campaign and campaign material – **Campaign expenses**.

5.1.1.5 Fundamental Rights – General questions – Entitlement to rights – **Legal persons**.

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression**.

*Keywords of the alphabetical index:*

Election, campaign, financing, by legal person, prohibition / Precedent, judicial, digression, criteria / *Stare decisis*, application, criteria / *Stare decisis*, nature / Freedom of expression, legal person.

*Headnotes:*

The expenditure of funds for political campaign communications is speech protected by constitutional freedom of speech guarantees.

Constitutional freedom of speech protection extends to corporations: like individual natural persons, corporations contribute to the discussion, debate, and dissemination of information and ideas that constitutional freedom of speech guarantees seek to foster, and therefore their speech should not be treated differently simply because they are not natural persons.

Political speech is expression that is central to the meaning and purpose of constitutional freedom of speech guarantees.

Laws that burden political speech are subject to strict scrutiny, which requires the government to prove that the restriction in question furthers a compelling interest and is narrowly tailored to achieve that interest.

No sufficient governmental interest justifies limits on the political speech of non-profit or for-profit corporations.

Under freedom of speech guarantees, the government may require corporations to disclose that they are the sponsors of political communications disseminated on broadcast, cable, and satellite television.

*Stare decisis*, or the precedential effect of the Court's judicial rulings, is a principle of policy and not a mechanical formula of adherence to the latest decision; therefore, the Court's precedents should be respected unless the most convincing of reasons demonstrates that adherence to them puts the Court on a course that is sure error.

Relevant considerations as to whether to adhere to the principle of *stare decisis* are the workability of a prior decision, the antiquity of the precedent, the reliance interests at stake, whether the decision was well reasoned, and whether experience has demonstrated the precedent's shortcomings.

*Summary:*

I. Citizens United, a non-profit corporation, filed a challenge to the constitutionality of certain provisions of a federal statute: the Bipartisan Campaign Reform Act of 2002 (BCRA). Citizens United had produced a political advertisement intended for dissemination on broadcast and cable television; however, because it was concerned about possible civil and criminal penalties for violating the BCRA provisions, it sought declaratory and injunctive relief. The advertisement, entitled "Hillary – The Movie", was a 90-minute video about Hillary Clinton, who at the time was a candidate for the Democratic Party nomination for U.S. President. In producing and sponsoring the video, Citizens United did not act in conjunction with any political party or candidates.

Specifically, Citizens United claimed that two sets of BCRA provisions violated its rights under the First Amendment to the U.S. Constitution: the first prohibited corporations and labor unions from spending their general treasury funds for speech that is an "electioneering communication" (a communication via broadcast, cable, or satellite television) or for speech that expressly advocates the election or defeat of a candidate; the second required the sponsors of election advertisements to disclose information about themselves in reports to the

Federal Elections Commission. The First Amendment states in relevant part that: “Congress shall make no law...abridging the freedom of speech...”

A three-judge panel of the U.S. District Court dismissed Citizen United’s motion for a preliminary injunction, and subsequently granted the defendant’s motion for summary judgment. In so doing, the District Court relied upon a 2003 U.S. Supreme Court decision, *McConnell v. Federal Election Commission*, which rejected a First Amendment challenge to campaign financing limits on electioneering communications, and which in turn relied upon the U.S. Supreme Court’s 1990 decision in *Austin v. Michigan Chamber of Commerce*, which held that political speech may be banned based on the speaker’s corporate identity.

II. On appeal, the U.S. Supreme Court reversed the District Court decision in part, and affirmed it in part. The Court reiterated its earlier case law that held that regulation generally of political campaign expenditures implicates First Amendment rights, and also that corporations as a general matter exercise rights guaranteed by the First Amendment. The Court recognised that Citizen United’s video was express advocacy that urged viewers to vote against Senator Clinton for President. However, the Court stated, a law burdening such political speech will be subject to strict scrutiny. Under strict scrutiny analysis, the proponent of such a regulation must prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. Applying this analysis, the Court ruled that the BCRA’s prohibition against corporate spending on political communications violated the First Amendment, stating that: “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.” According to the Court, “no sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”

In striking down the prohibition against corporate spending on political communications, the Court stated that it was overruling its *Austin v. Michigan Chamber of Commerce* decision and also the relevant part of the *McConnell v. Federal Election Commission* decision. In this regard, the Court addressed the question of the nature of the precedential nature of its decisions, stating that its precedents should be respected unless “the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error.” Relevant considerations as to whether to adhere to the principle of *stare decisis*, the Court stated, are the workability of a prior decision, the antiquity of the precedent, the reliance interests at stake, whether the

decision was well reasoned, and whether experience has demonstrated the precedent’s shortcomings. In sum, *stare decisis* in the Court’s view is a principle of policy and not a “mechanical formula of adherence to the latest decision.”

On the question of the BCRA’s disclosure requirements, the Court affirmed that part of the District Court’s decision that upheld the constitutionality of those requirements. While acknowledging that disclosure requirements may burden the ability to speak, they do not impose a ceiling on campaign-related activities and do not prevent anyone from speaking. Instead, they provide information to the electorate and avoid confusion by making clear that the advertisements in questions are not funded by a candidate or political party.

III. The Court’s judgment in *Citizens United v. FEC* was adopted by a 5-4 vote among the Justices. Justice Anthony Kennedy authored the Court’s opinion. A number of the Justices wrote separate concurring or dissenting opinions in which other Justices joined.

#### *Supplementary information:*

Because of its importance for campaign finance law, the decision received great national attention. Its aftermath included President Barack Obama’s public expression of disagreement during his State of the Union address six days later to the U.S. Congress and the members of the Supreme Court.

#### *Cross-references:*

- *Austin v. Michigan Chamber of Commerce*, 494 *United States Reports* 652, 110 *Supreme Court Reporter* 1391, 108 *Lawyer’s Edition Second* 652 (1990);
- *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).

#### *Languages:*

English.



*Identification: USA-2010-2-002*

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 20.04.2010 / **e)** 08-769 / **f)** United States v. Stevens / **g)** 130 *Supreme Court Reporter* 1577 (2010) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

2.3.2 Sources – Techniques of review – **Concept of constitutionality dependent on a specified interpretation.**

3.12 General Principles – **Clarity and precision of legal provisions.**

5.3.21 Fundamental Rights – Civil and political rights – **Freedom of expression.**

*Keywords of the alphabetical index:*

Animal cruelty, depictions / Overbreadth, substantial, criteria.

*Headnotes:*

The constitutional free speech guarantee does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits; instead, it reflects a judgment by the people that the benefits of its restrictions on the government outweigh the costs, and the Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

In the context of protected speech regulation, a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the legislation's plainly legitimate sweep.

The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether the statute reaches too far without first knowing what the statute covers.

A court may impose a limiting construction on a legislative act only if it is readily susceptible to such a construction; therefore, a court must not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain and sharply diminish the legislature's incentive to draft a narrowly tailored law in the first place.

*Summary:*

I. Robert Stevens ran a business and an associated website, through which he sold videos of pit bulls engaging in dogfights and attacking other animals.

On the basis of the videos, Stevens was indicted on three counts of violating Section 48 of Chapter 18 of the U.S. Code, which establishes a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty," if done "for commercial gain" in interstate or foreign commerce. The legislation does not address underlying acts harmful to animals, but only portrayals of such conduct. Section 48 defines a depiction of "animal cruelty" as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." In what is referred to as the "exceptions clause," the law exempts from prohibition any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." According to the legislative history, the legislature's primary target in Section 48 was so-called "crush videos," which feature the torture and killing of helpless animals.

Stevens moved to dismiss the indictment, claiming that Section 48 is invalid under the First Amendment to the U.S. Constitution, which states in relevant part that: "Congress shall make no law...abridging the freedom of speech...". The U.S. District Court denied the motion, holding that the depictions subject to Section 48, like obscenity or child pornography, are categorically unprotected by the First Amendment. The District Court also addressed the applicability of the overbreadth doctrine, under which a law will be invalidated as overbroad if a substantial number of its applications unconstitutionally regulate protected speech, in comparison to the amount of speech subject to the legislation's plainly legitimate sweep. The District Court ruled that Section 48 was not substantially overbroad, because the exceptions clause sufficiently narrows the scope of the legislation to constitutionally permissible applications.

At trial, the jury convicted Stevens on all counts, and the court sentenced him to three concurrent sentences of 37 months' imprisonment, followed by three years of supervised release. On appeal, the Third Circuit Court of Appeals declared Section 48 to be unconstitutional as a content-based regulation of protected speech and vacated Stevens's conviction.

II. The U.S. Supreme Court granted certiorari review. The Court's opinion first addressed the government's contention that Section 48 complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment. This argument was based on the fact that the First Amendment permits prohibitions on the content of speech in a few limited areas, such as obscenity, fraud, incitement, and child pornography.



Depictions of animal cruelty, the government argued, should be added to that list because they lack expressive value and therefore may be regulated as unprotected speech. On this basis, the government proposed that a claim of categorical exclusion should be considered under a simple balancing test that weighs the value of the speech against its societal costs.

The Court rejected the government's proposed test for categorical exclusion and its invitation to identify depictions of animal cruelty as unprotected speech, stating that First Amendment protections do not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. Instead, the Court stated, the First Amendment reflects a judgment by the people that the benefits of its restrictions on the Government outweigh the costs, and the Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. When it has identified categories of speech as fully outside the protection of the First Amendment, the Court said, that step has not been taken on the basis of a simple cost-benefit analysis, but only after consideration of other factors.

The Court then proceeded to rule that Section 48 was substantially overbroad and therefore constitutionally invalid. On this question, Stevens claimed that common depictions of ordinary and lawful activities constitute the vast majority of materials subject to Section 48. The Government did not defend such applications, but contended that the legislation is narrowly limited to specific types of extreme material. Thus, the Court noted, the constitutionality of Section 48 turned on the breadth of its construction. The Court construed it broadly, stating that its scope includes many types of depictions, such as hunting of animals, that extend beyond what the legislature sought to regulate but which are presumptively protected by the First Amendment. In this regard, the Court stated that it was unable to construe the statutory language to avoid constitutional doubt, noting that a limiting statutory construction can be imposed only if the statute is "readily susceptible" to such a construction. Otherwise, the Court declared, it will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain and sharply diminish the legislature's incentive to draft a narrowly tailored law in the first place.

The Court concluded by stating that it was not deciding whether legislation limited to crush videos or other depictions of extreme animal cruelty would be constitutional; instead, it simply was holding that Section 48 was not so limited.

III. The Court's judgment was adopted by an 8-1 vote among the Justices. Justice Samuel Alito filed a dissenting opinion.

*Languages:*

English.



*Identification: USA-2010-2-003*

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 17.05.2010 / **e)** 08-7412 / **f)** Graham v. Florida / **g)** 130 *Supreme Court Reporter* 2011 (2010) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.16 General Principles – **Proportionality.**

5.1.1.4.1 Fundamental Rights – General questions – Entitlement to rights – Natural persons – **Minors.**

5.3.3 Fundamental Rights – Civil and political rights – **Prohibition of torture and inhuman and degrading treatment.**

5.3.5.1 Fundamental Rights – Civil and political rights – Individual liberty – **Deprivation of liberty.**

*Keywords of the alphabetical index:*

Punishment, cruel and unusual / Minor, life imprisonment, without parole / Decency, evolving standards / Punishment, community consensus, justification.

*Headnotes:*

To determine whether a punishment is constitutionally impermissible because it is cruel and unusual, a court must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society.

The concept of proportionality is central to the constitutional prohibition against cruel and unusual punishments: punishment for a crime must be graduated and proportional to the offense.

A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.

Community consensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual and therefore constitutionally impermissible; instead, a reviewing court also must independently consider the culpability of the offenders at issue in light of their crimes and characteristics, the severity of the punishment in question, and whether the challenged sentencing practice serves legitimate penological goals.

Juveniles are less deserving of the most severe punishments because have lessened culpability; juveniles are not absolved of responsibility for their actions, but their transgressions are not as morally reprehensible as those of adults.

Defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. Serious nonhomicide crimes may be devastating in their harm, but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability.

Criminal punishment can have different goals, and choosing among them is within a legislature's discretion; however, it does not follow that the purposes and effects of penal sanctions are irrelevant to the judicial determination of whether they are constitutionally impermissible.

The constitutional prohibition against cruel and unusual punishments forbids the sentence of life without parole for a juvenile offender who did not commit homicide. It does not foreclose the possibility that juveniles convicted of nonhomicide crimes will be imprisoned for life, but it does forbid an initial judgment that those offenders never will be fit to reenter society.

### *Summary:*

I. Terrance Graham was sixteen years old when he committed armed burglary and attempted armed robbery. He pleaded guilty to both charges under a plea agreement. The State Court in the State of Florida sentenced him to probation and withheld adjudication of guilt. Subsequently, while the age of seventeen, he committed acts that led the court to determine that he had violated the terms of his probation. The Court also found him guilty of the earlier charges and sentenced him to life imprisonment for the burglary. Because Florida abolished its parole system, the life sentence left him without any possibility of release except executive clemency.

Graham appealed his sentence, claiming that it violated the Eighth Amendment to the U.S. Constitution, which states in relevant part that "cruel and unusual punishments" shall not be inflicted. The Eighth Amendment is applicable to the States through its incorporation in the Due Process Clause of Section One of the Fourteenth Amendment to the U.S. Constitution, which states in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law." The Florida Court of Appeals affirmed the trial court's decision. The Florida Supreme Court denied review of the Court of Appeals decision.

II. The U.S. Supreme Court granted *certiorari* to review the decision of the Florida Court of Appeals, and reversed that decision. The Court ruled that the Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender who has not committed homicide to be sentenced to life in prison without parole. The Clause, the Court stated, includes the precept that punishment for a crime must be proportionate to the offense.

In implementing the proportionality standard, the Court noted, its case law had fallen within two general categories: those in which the Court considered all the circumstances to determine whether the punishment is constitutionally excessive for the particular offender; and those in which the Court applied certain categorical rules in cases involving capital punishment. The instant case, the Court stated, related to the second category. In such cases, it takes a two-step approach: first, the consideration of objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue; and second, guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. The Court noted that the instant case presented an issue that it had not considered previously: a categorical challenge to a term-of-years sentence.

The Court concluded that a national consensus exists against the imposition of life imprisonment without parole for juvenile non-homicide offenders. Also, for a combination of reasons – penological theory, the limited culpability of juvenile offenders, and the severity of the sentence – the Court also concluded that the sentencing practice was cruel and unusual. It also noted, as additional support for its independent conclusions, that the United States was unique among the world's states in imposing this type of sentence.

---

*Languages:*

English.

*Identification:* USA-2010-2-004

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 28.06.2010 / **e)** 08-1521 / **f)** McDonald v. City of Chicago / **g)** 130 *Supreme Court Reporter* 3020 (2010) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty.**

5.3.8 Fundamental Rights – Civil and political rights – **Right to citizenship or nationality.**

5.3.12 Fundamental Rights – Civil and political rights – **Security of the person.**

5.3.35 Fundamental Rights – Civil and political rights – **Inviolability of the home.**

*Keywords of the alphabetical index:*

Arm, right to keep and bear / Due process / Firearm, right to keep and bear / Handgun, right to keep and bear / Citizenship, privileges and immunities.

*Headnotes:*

The constitutional right to keep and bear arms is an individual right.

The constitutional guarantees of protection for privileges and immunities, and of due process, present different questions; therefore, the nature of due process is entirely separate from the question of whether a right is a privilege or immunity of national citizenship.

The constitutional guarantees of privileges and immunities protect only those rights which owe their existence to the federal government, its national character, its Constitution, or its laws, whereas other fundamental rights – rights that predated the creation of the federal government and that the State governments were created to establish and secure – are not protected by the privileges and immunities guarantees.

The right to keep and bear arms for a lawful purpose was a pre-existing right predating the existence of the federal Constitution; therefore, it does not fall within the scope of constitutional protections for the privileges and immunities of national citizenship.

The governing standard regarding incorporation of rights under Due Process is whether a particular constitutional guarantee is fundamental to the United States' scheme of ordered liberty and system of justice.

The right to keep and bear arms is a fundamental right that is incorporated within the concept of Due Process and therefore fully applicable to the States.

Individual self-defense is the central component of the right to keep and bear arms.

Citizens must be permitted to use handguns for the core lawful purpose of self-defense because handguns are the most preferred firearm in the nation for protection of one's home and family.

*Summary:*

I. Individual residents of the City of Chicago, State of Illinois, residents of the Village of Oak Park, a Chicago suburb, and three private organisations filed three separate lawsuits in federal court, claiming that certain Chicago and Oak Park local ordinances prohibiting possession of handguns violated the complainants' rights under the Second and Fourteenth Amendments to the U.S. Constitution. One of the challenged Chicago ordinances provided that "[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm", and another prohibited registration of most handguns, thereby effectively banning handgun possession by almost all private residents of the City.

The Second Amendment states in full: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The question presented in the suit against Chicago and Oak Park was whether the Second Amendment applies not only to the federal government, but also to the States and their municipalities through the Fourteenth Amendment. Section One of the Fourteenth Amendment states in relevant part that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law." In a 2008 decision, *District of Columbia v. Heller*, the U.S. Supreme Court ruled that the Second Amendment

protects an individual right to keep and bear arms for self-defense, and not just a collective right for government-organised militias. However, that decision examined laws of the District of Columbia, which is a federal entity and not one of the States, and therefore did not address whether the Second Amendment applies to the States.

All three of the lawsuits were assigned to the same judge in the U.S. District Court. The District Court upheld the constitutionality of the ordinances, and the United States Court of Appeals for the Seventh Circuit affirmed.

II. The U.S. Supreme Court granted certiorari review, and reversed the Court of Appeals decision, holding that the Second Amendment right applies against state and local governments. In so doing, the Court addressed the complainants' two alternative arguments, both based on the Fourteenth Amendment: that the right to keep and bear arms is among the "privileges or immunities of citizens of the United States"; and that the Due Process Clause incorporates the Second Amendment right. Among the five Justices who supported reversal, a four-Justice plurality did so on the basis of incorporation through the Due Process Clause, while the fifth (Justice Thomas) maintained that the right should be recognised under the Privileges or Immunities Clause.

In rejecting reliance on the Privileges or Immunities Clause, the Court's plurality chose not to disturb the Court's 1873 holding in the *Slaughter-House Cases*. In that decision, rendered five years after ratification of the Fourteenth Amendment, the Court ruled that the Privileges or Immunities Clause protected only those rights of national citizenship that were wholly distinct from inalienable, fundamental rights of state citizenship that predated the creation of the federal government. Because the plurality in *McDonald* concluded that the right to keep and bear arms for a lawful purpose was a pre-existing right predating the existence of the federal Constitution, the right does not fall within the scope of the Privileges or Immunities Clause under the *Slaughter-House Cases* precedent.

In regard to the incorporation question, the Court stated that the governing standard is whether a particular constitutional guarantee is fundamental to the United States' scheme of ordered liberty and system of justice. Under this standard, the plurality concluded that the right to keep and bear arms is incorporated within Due Process because it is such a fundamental right, deeply rooted in the nation's history and tradition. In sections of the Court's opinion joined by Justice Thomas, the Court re-affirmed its

holding in *Heller* that the central component of the Second Amendment right is individual self-defense. The Court also emphasised that handguns are the most preferred firearm in the nation for protection of one's home and family, and that therefore citizens must be permitted to use handguns for the core lawful purpose of self-defense.

III. The Court's judgment in *McDonald* was adopted by a 5-4 vote among the Justices. Several Justices wrote separate concurring or dissenting opinions in which other Justices joined.

#### *Supplementary information:*

While the *Heller* and *McDonald* decisions present the U.S. Supreme Court's answers on two fundamental questions under the Second Amendment, many questions remain for future judicial application as to the constitutionally permissible scope of regulation of the exercise of the right to keep and bear arms.

#### *Cross-references:*

- *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008);
- *Butchers' Benevolent Association of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co. (Slaughter-House Cases)*, 83 U.S. 36, 21 L. Ed. 394 (1873).

#### *Languages:*

English.



# Inter-American Court of Human Rights

---

## Important decisions

*Identification:* IAC-2010-2-001

**a)** Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 16.11.2009 / **e)** Series C 205 / **f)** González *et al.* (“Cotton Field”) v. Mexico / **g)** / **h)** CODICES (English, Spanish).

*Keywords of the systematic thesaurus:*

5.2.2.1 Fundamental Rights – Equality – Criteria of distinction – **Gender**.

5.3.2 Fundamental Rights – Civil and political rights – **Right to life**.

5.3.4 Fundamental Rights – Civil and political rights – **Right to physical and psychological integrity**.

5.3.5 Fundamental Rights – Civil and political rights – **Individual liberty**.

5.3.13.2 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Effective remedy**.

5.3.15 Fundamental Rights – Civil and political rights – **Rights of victims of crime**.

5.3.44 Fundamental Rights – Civil and political rights – **Rights of the child**.

*Keywords of the alphabetical index:*

Investigation, effective, requirement / Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belém do Pará”) / Violence, gender-based / Women, violence, against, prevention.

*Headnotes:*

When the murder of a girl or woman takes place in a context of gender-based violence, the State has an obligation to adopt the measures necessary to verify whether the specific murder that it is investigating is related to that context.

States should adopt comprehensive measures to comply with their obligation of due diligence in cases of violence against women. In particular, they should establish an appropriate legal framework for protection

that is enforced effectively, as well as prevention policies and practices that allow effective measures to be taken in response to complaints. The prevention strategy should be comprehensive: it should prevent risk factors and strengthen State institutions so that they can respond effectively. The State should adopt preventive measures in specific cases in which it is evident that particular women and girls may be victims of violence. These measures should take into account that in cases of violence against women, the States have, in addition to the general obligation established in the American Convention, a greater obligation arising from the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (“Convention of Belém do Pará”).

When the State is aware that there is a real and imminent risk that particular victims of forced disappearance will be sexually abused, subjected to ill-treatment, and killed because they occurred in a context of heightened risk for women, an obligation of strict due diligence arises. Adequate procedures should exist for reporting disappearances, and those procedures should result in an immediate and effective investigation. Exhaustive search activities must be conducted during the first hours and days, and authorities must take prompt immediate action by ordering, without delay, the necessary measures to determine the whereabouts of the victims or the places where they may have been retained. Authorities should presume that a disappeared person has been deprived of liberty and is still alive until there is no longer any uncertainty as to her fate.

The obligation to investigate effectively has a wider scope when dealing with the case of a woman who is killed or mistreated, or whose personal liberty is affected, within a general context of violence against women. Where an attack is based on gender, it is particularly important that the investigation is pursued with vigor and impartiality, taking into account the need to continuously reassert society’s condemnation of gender-based violence and to maintain the confidence of women in the ability of authorities to protect them from the threat of such violence.

Investigators at crime scenes must, at a minimum: photograph the scene and any other physical evidence, as well as the body as it was found and after it has been moved; gather and conserve samples of blood, hair, fibers, threads and other clues; examine the area for footprints or other evidence; and prepare a detailed report on the crime scene, the measures taken by investigators, and the location of evidence gathered. Due diligence in the legal and medical investigation of a death requires that a precise history of the chain of custody of each item of forensic evidence be kept.

---

Allowing those responsible for serious irregularities in the investigation of cases of violence against women to continue in their functions or, worse, to occupy positions of authority may generate impunity and conditions that allow the context of violence to persist or worsen. Judicial ineffectiveness when dealing with individual cases of violence against women encourages an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women is tolerated and accepted as part of daily life.

Once it is shown that the application of a rule clearly affects a higher percentage of women than men, the State must show that this is the result of objective factors unrelated to any discrimination on grounds of gender. Indifference to claims of gender-based violence reproduces that violence and constitutes discrimination with respect to access to justice.

Gender stereotyping refers to a preconception of the personal attributes, characteristics or roles that correspond or should correspond to either men or women. The subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police. The creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.

### *Summary:*

I. Between September and October 2001, three women, two of them minors, disappeared in Ciudad Juarez, Mexico. These murders were perpetrated in a context of discrimination and violence against women in Ciudad Juarez, as well as high levels of impunity with respect to crimes motivated by gender. On 6 November 2001, the women's bodies were found in a cotton field with signs that they had suffered sexual violence. Before their remains were found, State authorities had merely registered the disappearances and prepared missing-persons posters, taken statements, and sent an official letter to the Judicial Police. There is no evidence that the authorities had circulated the posters or made more extensive inquiries into reasonably relevant facts provided in the statements taken. Also, various irregularities occurred in the investigation of the murders; among other things, State authorities had mishandled evidence at the scene of the crime, the performance of autopsies, and the identification of the bodies, incurred in unjustified delays, and failed to follow lines of inquiry that took into account the context of violence against women. Finally, no public officials were investigated in connection to these irregularities.

The Inter-American Commission on Human Rights filed an application against the State of Mexico on 4 November 2007, alleging violations of Article 4 ACHR (Right to Life), Article 5 ACHR (Right to Humane Treatment), Article 8 ACHR (Right to a Fair Trial), Article 19 ACHR (Rights of the Child) and Article 25 ACHR (Right to Judicial Protection) in connection with Article 1.1 ACHR (Obligation to Respect Rights) and Article 2 ACHR (Domestic Legal Effects), as well as a failure to comply with Article 7 of the Convention of Belém do Pará.

The representatives asked the Court to declare that the State was also responsible for violations of Article 7 ACHR (Right to Personal Liberty) and Article 11 ACHR (Right to Dignity and Honor), also in relation to Articles 1.1 and 2 ACHR and Articles 7, 8 and 9 of the Convention of Belém do Pará. The State admitted to the existence of a context of violence against women in Ciudad Juarez, as well as to irregularities in the "first stage" of investigations, which lasted from 2001 to 2003. It also accepted responsibility for the violation of the rights to personal integrity, judicial protection, and access to justice of the victims' next of kin. However, it challenged the Court's jurisdiction over alleged violations of the Convention of Belém do Pará.

II. In its Judgment of 16 November 2009, the Court first found that it had jurisdiction over alleged violations of Article 7 of the Convention of Belém do Pará; however, it did not have jurisdiction to examine alleged violations of Articles 8 and 9 thereof.

Additionally, the Court found insufficient evidence to support the alleged participation of State agents in the disappearances and killings. Therefore, it found no violation of the State's duty under Article 1.1 ACHR to respect the rights contained in Article 4 ACHR (Right to Life), Article 5 ACHR (Right to Personal Integrity) and Article 7 ACHR (Right to Personal Liberty). However, the Court also ruled that Mexico had failed to act with the diligence required to adequately prevent the violations committed against the victims once it had received notice of their disappearance. Thus, the State had failed to comply with its duty under Article 1.1 ACHR to guarantee the rights to life, personal integrity, and personal freedom of the three victims under Articles 4.1, 5.1, 5.2 and 7.1 ACHR; its obligation to adopt necessary legal provisions under Article 2 ACHR; as well as its obligations under Article 7.b and 7.c of the Convention of Belém do Pará.

Furthermore, the Court found that the State failed to fulfill its obligation to investigate the violations committed against the victims after they were found, given the irregularities in the handling of evidence,

autopsies, and identification of the bodies, unjustified delays, the failure to take into account the context of gender-based crimes, and the nonexistence of investigations into officials' negligent conduct. Thus, the Court ruled that Mexico violated Article 8.1 ACHR (Right to a Fair Trial) and Article 25.1 ACHR (Judicial Protection) in connection with Articles 1.1 and 2 ACHR and Article 7.b and 7.c of the Convention of Belém do Pará, to the detriment of the victims' next of kin.

Additionally, the Court ruled that because gender stereotypes used by authorities contributed to the context of violence against women, the State violated the obligation of non-discrimination contained in Article 1.1 ACHR, in relation to Articles 4.1, 5.1, 5.2 and 7.1 ACHR, to the detriment of the three victims that were disappeared, as well as the right of their families to access to justice established in Articles 8.1 and 25.1 ACHR.

Moreover, because it had failed to demonstrate that it had response mechanisms or public policies that would grant the institutions involved the means necessary to guarantee the rights of the girls, the State also violated the rights of the child under Article 19 ACHR, in connection to Articles 1.1 and 2 ACHR, to the detriment of the two victims who were under 18 years of age.

Finally, due to the irregular and deficient actions of authorities upon receiving notice of the victims' disappearance, their lack of diligence in determining the identities of the bodies and returning them to their next of kin, the circumstances and causes of the deaths, the lack of information on the ensuing investigations, and the treatment of the families during the entire process, among other things, the State violated Article 5.1 and 5.2 ACHR, in relation to Article 1.1 ACHR, to the detriment of the victims' next of kin.

The Court found it improper to examine whether the State violated the right to the protection of honour and dignity enshrined in Article 11 ACHR because the allegations relating to the violation of that Article were already examined in relation to Article 5 ACHR.

Accordingly, the Court ordered the State to investigate the disappearances, taking into account the context of gender-based violence, and the harassment of the victims' families; remove all obstacles impeding an effective investigation; divulge the investigation's results; and identify and sanction those officials who caused irregularities in the prior investigations. The Court also ordered the State, *inter alia*, to standardise its protocols, manuals, and investigative standards for crimes relating to disappearances, sexual violence,

and the killing of women; modify its response mechanism for reports of missing women and girls; publish the Judgment; acknowledge its responsibility in a public act; establish a monument in memory of the victims; create a website on disappeared women and girls that allows the submission of anonymous tips; create a database on disappeared women and girls containing personal and genetic information; implement permanent education and training programs on human rights and gender for public officials and the general population of the state of Chihuahua; provide medical and psychological care to the victims' families; and pay for damages and costs.

III. Judges Diego García-Sayán and Cecilia Medina Quiroga each wrote a separate concurring opinion.

*Languages:*

Spanish, English.



# Court of Justice of the European Union

---

## Important decisions

*Identification:* ECJ-2010-2-008

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 09.09.2008 / **e)** C-120/06 P and C-121/06 P / **f)** FIAMM and FIAMM Technologies v. Council of the European Union and Commission of the European Communities / **g)** *European Court Reports*, I-06513 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

1.3.5.15 Constitutional Justice – Jurisdiction – The subject of review – **Failure to act or to pass legislation.**

2.1.1.4 Sources – Categories – Written rules – **International instruments.**

4.5.9 Institutions – Legislative bodies – **Liability.**

5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**

5.3.13.8 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right of access to the file.**

5.3.17 Fundamental Rights – Civil and political rights – **Right to compensation for damage caused by the State.**

5.3.39 Fundamental Rights – Civil and political rights – **Right to property.**

5.4.4 Fundamental Rights – Economic, social and cultural rights – **Freedom to choose one's profession.**

*Keywords of the alphabetical index:*

World Trade Organisation, agreements, effects in European Community, judicial review, exclusion / Liability, non contractual, lawful act, exclusion.

*Headnotes:*

1. The question whether the grounds of a judgment of the Court of First Instance are contradictory or inadequate is a question of law which is amenable, as such, to judicial review on appeal.

In that connection, the requirement that the Court of First Instance give reasons for its decisions cannot be interpreted as meaning that it is obliged to respond in detail to every single argument advanced by an applicant, particularly if the argument is not sufficiently clear and precise.

Nor does the obligation to state reasons require the Court of First Instance to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case. The reasoning may therefore be implicit on condition that it enables the persons concerned to know why the Court of First Instance has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see paragraphs 90-91, 96).

2. The effects within the Community of provisions of an agreement concluded by the Community with non-member states may not be determined without taking account of the international origin of the provisions in question. In conformity with the principles of public international law, Community institutions which have power to negotiate and conclude such an agreement are free to agree with the non-member states concerned what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. If that question has not been expressly dealt with in the agreement, it is the courts having jurisdiction in the matter and in particular the Court of Justice within the framework of its jurisdiction under the Treaty that have the task of deciding it, in the same manner as any other question of interpretation relating to the application of the agreement in question in the Community, on the basis in particular of the agreement's spirit, general scheme or terms.

Thus, specifically, it falls to the Court to determine whether the provisions of an international agreement confer on persons subject to Community law the right to rely on that agreement in legal proceedings in order to contest the validity of a Community measure.

The Court can examine the validity of secondary Community legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise (see paragraphs 108-110).

3. A decision of the Dispute Settlement Body (DSB) of the WTO, which has no object other than to rule on whether the conduct of a WTO member is consistent with the obligations entered into by that State within the context of the WTO, cannot in principle be



fundamentally distinguished from the substantive rules which convey such obligations and by reference to which such a review is carried out, at least when it is a question of determining whether or not an infringement of those rules or that decision can be relied upon before the Community courts for the purpose of reviewing the legality of the conduct of the Community institutions.

A recommendation or a ruling of the DSB finding that the substantive rules contained in the WTO agreements have not been complied with is, whatever the precise legal effect attaching to such a recommendation or ruling, no more capable than those rules of conferring upon individuals a right to rely thereon before the Community courts for the purpose of having the legality of the conduct of the Community institutions reviewed, whether the review is in annulment proceedings or for the purpose of deciding an action for compensation.

First, the nature of the WTO agreements and the reciprocity and flexibility characterising them continue to obtain after such a ruling or recommendation has been adopted and after the reasonable period of time allowed for its implementation has expired. The Community institutions continue in particular to have an element of discretion and scope for negotiation *vis-à-vis* their trading partners with a view to the adoption of measures intended to respond to the ruling or recommendation, and such leeway must be preserved.

Second, as is apparent from Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, which forms Annex 2 to the Agreement establishing the WTO, recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the agreements concerned. It follows in particular that a decision of the DSB finding an infringement of such an obligation cannot have the effect of requiring a party to the WTO agreements to accord individuals a right which they do not hold by virtue of those agreements in the absence of such a decision (see paragraphs 120, 128-131).

4. In affirming the existence of a regime providing for non-contractual liability of the Community on account of the lawful pursuit by it of its activities falling within the legislative sphere, the Court of First Instance erred in law. As Community law currently stands, no liability regime exists under which the Community can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts.

It is immaterial in this regard whether that conduct is to be regarded as a positive act, that is to say, for example, the adoption of regulations following a decision of the Dispute Settlement Body (DSB) of the WTO, or as an omission, that is to say the failure to adopt measures calculated to ensure the correct implementation of that decision. Failure on the part of the Community institutions to act can also fall within the legislative function of the Community, including in the context of actions for damages.

However, the Community legislature enjoys a broad discretion for the purpose of assessing whether the adoption of a given legislative measure justifies, when account is taken of certain harmful effects that are to result from its adoption, the provision of certain forms of compensation.

Also, a Community legislative measure whose application leads to restrictions of fundamental rights, such as the right to property and the freedom to pursue a trade or profession, that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Community (see paragraphs 176, 178-179, 181, 184).

5. An economic operator cannot claim a right to property in a market share which he held at a given time, since such a market share constitutes only a momentary economic position, exposed to the risks of changing circumstances. Nor can the guarantees accorded by the right to property or by the general principle safeguarding the freedom to pursue a trade or profession be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.

An economic operator whose business consists in particular in exporting goods to the markets of non-member States must therefore be aware that the commercial position which he has at a given time may be affected and altered by various circumstances and that those circumstances include the possibility, which is moreover expressly envisaged and governed by Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which forms Annex 2 to the Agreement establishing the WTO, that one of the non-member States will adopt measures suspending concessions in reaction to the stance taken by its trading partners within the framework of the WTO and will for this purpose select in its discretion, as follows from Article 22.3.a and 22.3.f of the DSU, the goods to be subject to those measures (see paragraphs 185-186).

6. If the grounds of a judgment of the Court of First Instance disclose an infringement of Community law but its operative part is shown to be well founded on other legal grounds, the appeal must be dismissed (see paragraph 187).

7. Where there is no indication that the length of the proceedings affected their outcome in any way, a plea that the proceedings before the Court of First Instance did not satisfy the requirements concerning completion within a reasonable time cannot as a general rule lead to the setting aside of the judgment delivered by the Court of First Instance.

In addition, the reasonableness of the length of proceedings before the Court of First Instance must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (see paragraphs 203, 212).

#### Summary:

I. The FIAMM and Fedon companies, manufacturers and exporters of fixed storage batteries and spectacle cases respectively, were both subject between 1999 and 2001 to the increased customs duty imposed by the authorities of the United States of America. This increased customs duty constituted a retaliatory measure against the regime governing the trade in bananas which was in force in the European Union prior to 2001 and was declared incompatible with the rules of the World Trade Organisation (hereinafter, "the WTO") by its Dispute Settlement Body (hereinafter, the "DSB").

Indeed, this regime embodied, *inter alia*, preferential provisions in favour of the bananas originating from certain states of Africa, the Caribbean and the Pacific.

The DSB held this regime to be incompatible with the WTO agreements. The European Union thereupon adopted a new regulation. However, the DSB found this new regime to be still incompatible with the WTO agreements and thus authorised the United States to levy this additional duty on imports of certain Community goods.

The two companies initially asked the Court of First Instance to order the Commission and the Council to redress the damage which they claimed to have incurred in consequence of the increased customs duty levied by the United States on their exports.

In two judgments, the Court dismissed these applications in December 2005 but did not dismiss the possibility that rules of non-contractual liability in the absence of an unlawful act by the Community might apply if certain conditions were fulfilled.

At a further stage, the two companies FIAMM and Fedon brought appeals against these judgments before the Court of Justice of the European Union. The Council and the Commission for their part sought to contest especially the recognition by the Court of First Instance of the existence of rules governing the Community's no-fault liability.

II. The Court firstly confirmed that the WTO agreements and the decisions of the DSB were not among the provisions in respect of which the Community court reviewed the legality of action by the Community institutions. Consequently, there was no unlawful conduct of an institution capable of incurring the Community's non-contractual liability.

Since the appellants were not able to plead an illegality in the conduct of the Community, they shifted their ground entirely to the allegation of liability without illegality. However, the Court did not concur with them in this and held that, since the legal systems of the Member States disclosed no consensus as to the existence of a principle of liability in the case of a lawful act of the public authorities, above all where such an act was of a legislative nature, Community law did not in itself embody any regime under which the Community could incur liability for a lawful legislative act.

The Court nevertheless acknowledged an exception: where the performance of a Community legislative act led to restrictions on fundamental rights such as the right of property or the right to engage freely in a professional activity, non-contractual liability on the part of the Community could be incurred if the application of that act resulted in a disproportionate and intolerable impairment of the very substance of those rights.

#### Cross-references:

- CFI, 14.12.2005, *Beamglow v. Parliament e.a.* (T-383/00, ECR, p. II-05459).

#### Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



*Identification:* ECJ-2010-2-009

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 08.10.2008 / **e)** T-69/04 / **f)** Schunk GmbH and Schunk Kohlenstoff-Technik GmbH v. Commission of the European Communities / **g)** *European Court Reports*, II-02567 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

2.1.1.3 Sources – Categories – Written rules – **Community law**.  
 3.10 General Principles – **Certainty of the law**.  
 3.13 General Principles – **Legality**.  
 3.14 General Principles – **Nullum crimen, nulla poena sine lege**.  
 3.16 General Principles – **Proportionality**.  
 5.2 Fundamental Rights – **Equality**.

*Keywords of the alphabetical index:*

Competition, agreements, fine, amount / Constitutional traditions, common to the member states.

*Headnotes:*

1. The principle that penalties must have a proper legal basis is a corollary of the principle of legal certainty, which constitutes a general principle of Community law and requires, *inter alia*, that any Community legislation, in particular when it imposes or permits the imposition of sanctions, must be clear and precise so that the persons concerned may know without ambiguity what rights and obligations flow from it and may take steps accordingly. That principle, which forms part of the constitutional traditions common to the Member States and which has been enshrined in various international treaties, in particular in Article 7 ECHR, must be observed in regard both to provisions of a criminal nature and to specific administrative instruments imposing or permitting the imposition of administrative sanctions. It applies not only to the provisions which establish the elements of an offence, but also to those which define the consequences of contravening them. It follows from Article 7.1 ECHR that convention that offences and the relevant penalties must be clearly defined by law. That requirement is satisfied where the individual can know from the wording of the

relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

According to the case-law of the European Court of Human Rights, there is no requirement that the wording of provisions pursuant to which those sanctions are imposed be so precise that the consequences which may flow from an infringement of those provisions are foreseeable with absolute certainty. According to that case-law, the existence of vague terms in the provision does not necessarily entail an infringement of Article 7 ECHR and the fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference. In that connection, apart from the text of the law itself, the European Court of Human Rights takes account of whether the indeterminate notions used have been defined by consistent and published case-law. Moreover, there is nothing in the constitutional traditions common to the Member States which would justify a different interpretation of the principle of legality, which is a general principle of Community law (see paragraphs 28-29, 32-34).

2. Article 15.2 of Regulation no. 17, relating to the imposition of fines on undertakings that have infringed the competition rules, does not infringe the principle that penalties must have a proper legal basis.

The Commission does not have unlimited discretion in setting fines for infringements of the competition rules as it must comply with the ceiling fixed by reference to the turnover of the undertakings concerned and must take into account the gravity and duration of the infringement. Moreover, the ceiling of 10% of the turnover of the undertaking concerned is reasonable, having regard to the interests defended by the Commission in taking proceedings against and fining infringements of the competition rules and the fact that Article 15.2 of Regulation no. 17 permits the establishment of a system which fits the fundamental tasks of the Community. When setting the fines, the Commission is also required to comply with the general principles of law, in particular the principles of equal treatment and proportionality. Moreover, the Commission itself has developed a well-known and accessible administrative practice which, although not constituting the legal framework for fines, may nevertheless serve as a reference point with regard to respect for the principle of equal treatment, the Commission being entitled at any time to adjust the level of fines within the

limits laid down in Article 15.2 if the proper application of the Community competition rules so requires. Moreover, the Commission has adopted guidelines for the setting of fines, so that it has imposed limits on the exercise of its discretion, thereby contributing to legal certainty, and must comply in particular with the principles of equal treatment and proportionality. Furthermore, the adoption by the Commission of those guidelines, in so far as it fell within the statutory limits laid down by Article 15.2 of Regulation no. 17, merely contributed to defining the limits of the exercise of the discretion which the Commission already had under that provision, and it cannot be inferred from their adoption that the limits of the Commission's competence in the area at issue were initially not sufficiently determined by the Community legislature. Finally, the Commission is required under Article 253 EC to state the reasons for decisions imposing a fine (see paragraphs 35-36, 38-44, 46).

### Summary:

I. The Commission penalised some German and French enterprises for their participation in an agreement on the marketing of carbon and graphite based products. The enterprises concerned brought an appeal before the Court of First Instance in order to have the Commission's decision set aside and, in the alternative, to have their respective fines reduced.

In the instant case, the appellants had acknowledged overall the correctness of the facts and their legal classification by the Commission, while expressing some reservations on certain points, but alleged a violation by the Commission of the principles of proportionality and equal treatment in fixing the amount of the fine.

II. The Court recalled from a procedural standpoint that "where the undertaking alleged to have infringed the competition rules does not expressly acknowledge the facts, the Commission will have to prove those facts and the undertaking is free to put forward, at the appropriate time and in particular in the procedure before the Court, any plea in its defence which it deems appropriate. However, it follows that this cannot be the case where the undertaking at issue acknowledged the facts". The Court was prompted to sift the contentions of the appellants and entertain only those which, not being included in the overall acknowledgement of the facts and of their legal classification, could not be deemed expressly acknowledged during the administrative procedure. It followed that a point of the decision not clearly set out in the statement of objections could be contested.

As to the calculation of the amount of the fine, the Court dismissed the plea of illegality of Article 15.2 of

Regulation no. 17 enabling the Commission to impose fines of up to 10% of the turnover of the enterprises concerned. It considered that this provision did not infringe the principle of legal certainty in so far as, while allowing the Commission a certain margin of discretion, it determined the criteria and limits to which that institution was subject in the exercise of its power to impose fines.

Finally, the Commission demanded the cancellation of the 10% reduction in the fine granted for the Schunk company's co-operation. The Court recalled that the amount of a fine could only be determined according to the gravity and duration of an infringement. Thus, "the fact that the Commission was constrained to draw up a defence dealing with facts which it was entitled to consider would no longer be called in question is not such as to justify an increase of that fine".

### Cross-references:

- CJEC, 16.11.2000, *SCA Holding v. Commission*, point 37 (C-297/98, ECR, p. I-10101).

### Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



### Identification: ECJ-2010-2-010

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 14.10.2008 / **e)** C-353/06 / **f)** Grunkin and Paul / **g)** *European Court Reports*, I-07639 / **h)** CODICES (English, French).

### Keywords of the systematic thesaurus:

3.26.1 General Principles – Principles of Community law – **Fundamental principles of the Common Market.**

5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**

5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality.**

5.3.6 Fundamental Rights – Civil and political rights – **Freedom of movement.**

*Keywords of the alphabetical index:*

Community law, principles, equal treatment / Free movement, persons, national rules, conflicts of laws, family name, determination / Name, registration, conflicting national rules.

*Headnotes:*

1. Where a child, who is a national of one Member State and is lawfully resident in the territory of a second Member State, and his parents have only the nationality of the first Member State and, in respect of the conferring of a surname, the conflicts rule of the first Member State refers to the domestic substantive law on surnames, the determination of that child's surname in that Member State in accordance with its legislation cannot constitute discrimination on grounds of nationality within the meaning of Article 12 EC (see paragraphs 16-18, 20).

2. Article 18 EC precludes the authorities of a Member State, in applying national law which uses nationality as the sole connecting factor for the determination of surnames, from refusing to recognise a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth. Having to use a surname, in the Member State of which the person concerned is a national, that is different from that conferred and registered in the Member State of birth and residence is liable to hamper the exercise of the right, established in Article 18 EC, to move and reside freely within the territory of the Member States. In that regard, a discrepancy in surnames is liable to cause serious inconvenience for the person concerned, *inter alia*, in both the public and the private spheres on account of the fact that, as he has only one nationality, he will be issued with a passport by the State of which he is a national and which alone has the competence to do so, in a name that is different from the name he was given in the State of birth and residence. In that regard, the child concerned risks having to dispel doubts concerning his identity and suspicions of misrepresentation caused by the difference between the two surnames every time he has to prove his identity in the Member State of residence. Furthermore, in relation to attestations, certificates and diplomas or any other document establishing a right, any difference in surnames is likely to give rise to doubts as to the authenticity of the documents submitted, or the veracity of their content.

In view of the fact that the person concerned will bear a different name every time he crosses the border between the two Member States concerned, the connecting factor of nationality, which seeks to ensure that a person's surname may be determined with continuity and stability, will result in an outcome contrary to that sought, in such a way that it cannot justify that refusal. The objective of preserving relationships between members of an extended family, however legitimate that objective may be in itself, also does not warrant having such importance attached to it as to justify such a refusal. Furthermore, the considerations of administrative convenience which led the Member State whose nationality the person concerned possesses to prohibit double-barrelled surnames cannot suffice to justify such an obstacle to freedom of movement, particularly because the prohibition in question does not appear to be absolute in view of the legislation of the Member State concerned (see paragraphs 22-23, 25-28, 31-32, 36-37, operative part).

*Summary:*

I. Leonard Matthias Grunkin-Paul was born in Denmark in 1998 to parents both of German nationality. The child also has German nationality and has lived in Denmark since he was born.

In accordance with Danish law, the child was given the name Grunkin-Paul (being the surnames of his father and mother) and this was entered in his birth certificate. A double-barrelled surname is possible in Denmark.

In 2006 the child's parents applied to have him registered with the surname Grunkin-Paul in the family register held in Niebüll in Germany. The competent authorities refused to carry out the registration on the ground that German law did not allow it. Mr Grunkin and Ms Paul then brought an appeal against this decision of the German administration before the *Amtsgericht Flensburg* (district court). The latter decided to turn to the Court of Justice of the European Union and enquire whether or not it was compatible with Community law for a Union citizen to be compelled to bear a different surname in different Member States.

II. The Court observed firstly that an underage child benefited from the rules on freedom of movement if resident in the territory of a different Member State from the one of which he was a national.

Next, the Court found that having to use a surname, in the Member State of which the person concerned was a national, differing from the name already conferred and registered in the Member State of birth

and residence was liable to hamper the exercise of the right to move and reside freely within the territory of the Member States. The Court mentioned various disadvantages and inconveniences in both the occupational and the private sphere linked with this type of divergence.

In this context, and since it had not been possible to justify any restrictive German provision, the Court held that it was against Community law for the German authorities to refuse to recognise the surname of Leonard Matthias as conferred and registered in Denmark.

#### *Supplementary information:*

It may be noted that this is not the first time the Court of Justice has had to rule on national regulations for conferring names, and the present judgment simply confirms its “Garcia Avello” precedent of 2 October 2003 (C-148/02, *Reports* p. I-11613) in which it already recognised the right to bear the same name in all Member States.

#### *Cross-references:*

- CJEC, 02.10.2003, *Garcia Avello* (C-148/02, *ECR*, p. I-11613).

#### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



#### *Identification:* ECJ-2010-2-011

**a)** European Union / **b)** Court of First Instance / **c)** Seventh Chamber / **d)** 15.10.2008 / **e)** T-345/05 / **f)** Ashley Neil Mote v. European Parliament / **g)** *European Court Reports*, II-02849 / **h)** CODICES (English, French).

#### *Keywords of the systematic thesaurus:*

4.5.2.1 Institutions – Legislative bodies – Powers – **Competences with respect to international agreements.**

4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**

4.17.1.1 Institutions – European Union – Institutional structure – **European Parliament.**

5.1.1.4 Fundamental Rights – General questions – Entitlement to rights – **Natural persons.**

5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**

#### *Keywords of the alphabetical index:*

European Union, Parliament, member immunity / Immunity, Parliament, member, lifting, right to appeal.

#### *Headnotes:*

1. The legality of a decision by which the Parliament waives the immunity of one of its Members may be reviewed by the Community judicature under Article 230.1 EC inasmuch as it constitutes an act which produces or is intended to produce legal effects with respect to third parties.

That decision has legal effects going beyond the internal organisation of the Parliament since the decision makes it possible for proceedings to be brought against the Member to whom the application for a waiver of immunity relates.

In that regard, although the privileges and immunities set out in the Protocol on the Privileges and Immunities of the European Communities have been granted solely in the interests of the Community, the fact remains that they have been expressly accorded to the officials and other staff of institutions of the Community and to the Members. The fact that the privileges and immunities have been provided in the public interest of the Community justifies the power given to the institutions to waive the immunity where appropriate but does not mean that these privileges and immunities are granted to the Community and not directly to its officials, other staff and Members. Therefore the Protocol confers an individual right on the persons concerned, compliance with which is ensured by the right of recourse provided for in Article 230 EC (see paragraphs 28-29, 31).

3. It is apparent from the last paragraph of Article 10 of the Protocol on the Privileges and Immunities of the European Communities, according to which immunity cannot prevent the European Parliament from exercising its right to waive the immunity of one of its Members, that the Parliament is competent to decide on an application for waiver of the immunity of a Member. By contrast, there is no rule, either in the Protocol or in the Rules of Procedure of the European

Parliament, establishing the Parliament as the competent authority for deciding whether the privilege provided for by Article 8 of the Protocol applies.

Furthermore, the field of application of Articles 8 and 10 of the Protocol is not the same. The objective of Article 10 is to safeguard the independence of Members by ensuring that pressure, in the form of threats of arrest or legal proceedings, is not brought to bear on them during the sessions of the Parliament whereas Article 8 has the function of protecting Members against restrictions on their freedom of movement, other than judicial restrictions.

As the Parliament lacks the competence to waive the privilege provided for by Article 8 it does not err in law where it decides to waive the immunity of a Member without ruling on the privilege which was granted to him in his capacity as a Member of the Parliament (see paragraphs 45-47, 50-51, 69).

#### Summary:

I. Mr Mote received various State benefits between 1996 and 2002. Criminal proceedings were brought against him on the ground that those benefits had been obtained on the basis of false declarations.

Following his election to the European Parliament in June 2004, Mr Mote applied for the criminal proceedings pending against him to be stayed, relying on the privileges and immunities that he enjoyed in his capacity as a parliamentarian. The prosecution was stayed by the competent national court in November 2004. That court held that the bail condition under which Mr Mote had been placed infringed the Protocol on the Privileges and Immunities of the European Communities.

Following an application by the Attorney General of England and Wales in February 2005, the European Parliament decided in July 2005 to waive Mr Mote's immunity.

The proceedings were then resumed against Mr Mote, who was found guilty at Portsmouth Crown Court and sentenced to 9 months' imprisonment. An appeal was lodged against this decision.

Mr Mote also lodged an application with the Court of First Instance of the European Union in September 2005 for annulment of the Parliament's decision to waive his immunity.

II. The Court first held that an application for annulment can be lodged against a decision of the European Parliament waiving the immunity of one its

members. The Court then detailed the Parliament's powers regarding the privileges and immunities of its members and held that the Parliament is not empowered to decide on the conditions for implementing the protection of MEPs' freedom of movement under Article 8 of the Protocol. However, judicial restrictions to freedom of movement do not come under that provision, but under Article 10 of the Protocol. Consequently, since the measures taken against Mr Mote belong to the category of judicial restrictions, the Parliament did not commit an error of law in deciding to waive his immunity without ruling on the privilege granted to him under Article 8 of the Protocol.

#### Cross-references:

- CJEC, 21.10.2008, *Alfonso Luigi Marra v. Eduardo De Gregorio and Antonio Clemente* (C-200/07 and C-201/07, ECR, p. I-07929).

#### Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



#### Identification: ECJ-2010-2-012

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 21.10.2008 / **e)** C-200/07 et C-201/07 / **f)** Alfonso Luigi Marra v. Eduardo De Gregorio and Antonio Clemente / **g)** *European Court Reports*, I-07929 / **h)** CODICES (English, French).

#### Keywords of the systematic thesaurus:

3.26.3 General Principles – Principles of Community law – **Genuine co-operation between the institutions and the member states.**

4.5.11 Institutions – Legislative bodies – **Status of members of legislative bodies.**

4.17.1.1 Institutions – European Union – Institutional structure – **European Parliament.**

*Keywords of the alphabetical index:*

European Union, Parliament, member, immunity / Immunity, Parliament, member, defence.

*Headnotes:*

1. Article 9 of the Protocol on the Privileges and Immunities of the European Communities sets out the principle of immunity of Members of the European Parliament in respect of opinions expressed or votes cast by them in the performance of their duties. As that article makes no reference to national rights, the scope of that immunity must be established on the basis of Community law alone.

Such immunity must, to the extent that it seeks to protect the freedom of expression and independence of Members of the European Parliament, be considered as an absolute immunity barring any judicial proceedings in respect of an opinion expressed or a vote cast in the exercise of parliamentary duties. Therefore, in an action brought against a Member of the European Parliament in respect of opinions he has expressed, the national court is obliged to dismiss the action brought against the Member concerned where it considers that that Member enjoys the immunity provided for in Article 9 of that Protocol. Both that court and the European Parliament are bound to respect that provision. As that immunity cannot be waived by the European Parliament, it is for the national court to dismiss the action in question (see paragraphs 26-27, 44, 46, operative part).

2. The Community rules relating to the immunity of Members of the European Parliament must be interpreted as meaning that, in an action for damages brought against a Member of the European Parliament in respect of opinions he has expressed, the national court which has to rule on such an action is not obliged to request the Parliament to give a decision on whether the conditions for the immunity provided for in Article 9 of the Protocol on Privileges and Immunities of the European Communities are met where it has received no information regarding a request by that Member to the European Parliament seeking defence of that immunity.

The Protocol does not confer on the Parliament the power to determine, in cases of legal proceedings against one of its Members in respect of opinions expressed or votes cast by him, whether the conditions for applying that immunity are met. Therefore, such an assessment is within the exclusive jurisdiction of the national courts which are called on to apply such a provision, and which have no choice but to give due effect to that immunity if

they find that the opinions or votes at issue were expressed or cast in the exercise of parliamentary duties. In addition, even if the Parliament, pursuant to a request from the Member concerned, adopts, on the basis of its rules of procedure, a decision to defend immunity, that constitutes an opinion which does not have binding effect with regard to national judicial authorities.

However, where the national court is informed of the fact that that Member has made a request to the European Parliament for defence of that immunity, within the meaning of Rule 6.3 of the Rules of Procedure of the Parliament, it must stay the judicial proceedings and request the Parliament to issue its opinion as soon as possible.

The duty of sincere cooperation between the European institutions and the national authorities, enshrined in Article 10 EC and reiterated in Article 19 of the Protocol, which applies both to the national judicial authorities of Member States acting within their jurisdictions and to the Community institutions, and which is of particular importance where that cooperation involves the judicial authorities of a Member State who are responsible for ensuring respect for Community law in the national legal system, applies in the context of disputes such as those in the main proceedings. The European Parliament and the national judicial authorities must therefore cooperate in order to avoid any conflict in the interpretation and application of the provisions of the Protocol (see paragraphs 32-33, 39, 41-42, 46, operative part).

*Summary:*

I. In this case, the Court interprets the Protocol on Privileges and Immunities and the Rules of Procedure of the European Parliament in order to determine whether, when an action is brought against an MEP in a national court, that court is required to seek the opinion of the European Parliament and may not give a ruling until the latter has stated its position.

Mr De Gregorio and Mr Clemente brought actions for damages against Mr Marra for the injury which he had allegedly caused them by distributing a leaflet containing insulting remarks about them while he was a Member of the European Parliament. The trial judges did not accept that Mr Marra's behaviour towards Mr De Gregorio and Mr Clemente constituted opinions expressed in the exercise of his office.

Before the *Corte di Cassazione*, Mr Marra complained of an infringement of the European Parliament's Rules of Procedure because authorisation had not been sought from the Parliament before proceedings were



initiated against him. The *Corte di Cassazione* sought preliminary rulings from the Court of Justice of the European Union, asking it to clarify the rules under which Article 9 of the Protocol on Privileges and Immunities is implemented by national courts and by the Parliament.

II. The Court first of all specified the scope of Article 9, holding that the immunity provided for under that article must, to the extent that it seeks to protect the freedom of expression and independence of Members of the European Parliament, be considered as an absolute immunity barring any judicial proceedings.

Since the Parliament is not empowered to determine whether the conditions for applying that immunity are met, the Court held that such an assessment is within the exclusive jurisdiction of the national courts. Moreover, the national courts are not obliged to refer the question to the Parliament.

It should be noted that even if the Parliament, pursuant to a request from the Member concerned, adopts a decision to defend immunity, that constitutes an opinion which does not have binding effect with regard to national judicial authorities.

The Court went on to say that where an action has been brought against a Member of the European Parliament before a national court and that court is informed that a procedure for defence of the privileges and immunities of that Member has been initiated, the duty of co-operation requires that court to stay the judicial proceedings and request the Parliament to issue its opinion as soon as possible.

Lastly, the Court pointed out that once the national court has established that the conditions for the immunity provided for in Article 9 of the Protocol are met, the court is bound to respect that immunity, as is the Parliament. It follows that such immunity cannot be waived by the Parliament and that, as a result, that court is bound to dismiss the action brought against the Member concerned.

#### Cross-references:

- CFI, 15.10.2008, *Ashley Neil Mote v. European Parliament* (T-345/05, ECR, p. II-02849).

#### Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



#### Identification: ECJ-2010-2-013

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 25.11.2008 / **e)** C-455/06 / **f)** / Heemskerk BV and Firma Schaap v. Productschap Vee en Vlees / **g)** *European Court Reports*, I-08763 / **h)** CODICES (English, French).

#### Keywords of the systematic thesaurus:

3.10 General Principles – **Certainty of the law**.  
5.3.13.16 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Prohibition of *reformatio in peius***.

#### Keywords of the alphabetical index:

Community law, application *ex officio*, by national courts / Procedural autonomy, national / Community law, primacy.

#### Headnotes:

Community law does not require national courts to apply, of their own motion, a provision of Community law where such application would lead them to deny the principle, enshrined in the relevant national law, of the prohibition of *reformatio in peius*.

Such an obligation would be contrary not only to the principles of respect for the rights of the defence, legal certainty and protection of legitimate expectations, which underlie the prohibition, but would expose an individual who brought an action against an act adversely affecting him to the risk that such an action would place him in a less favourable position than he would have been in, had he not brought that action (see paragraphs 47-48, operative part 4).

#### Summary:

I. Under Regulation no. 1254/1999, the payment of export refunds for live animals is subject to compliance with the provisions of Community legislation on animal welfare and, in particular, the protection of animals during transport.

In the instant case, 300 heifers were exported from the Netherlands to Morocco and the official veterinarian who checked the loading operation in the Netherlands certified that the conditions set out in Regulation no. 615/98 had been fulfilled. However, during a check carried out pursuant to Regulation no. 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the EAGGF, it was found that the welfare conditions for bovine animals during transport had not been complied with and that the vessel had clearly been overloaded.

The Productschap accordingly withdrew the export refund granted to the applicant companies and called for repayment of the amounts already paid. Following a complaint by the applicants, the Productschap reduced the amounts of the sums to be recovered, deciding that the refund would only cover the excess portion of the load. But the applicant companies maintained their claims, arguing that the certificate issued by the official veterinarian was conclusive, and brought an action.

The national court wondered whether Community law required it to raise of its own motion arguments based on that law (Regulation no. 1254/1999) when the parties had not relied on them and national rules of procedure precluded their being taken into account. It therefore referred the question to the Court of Justice for a preliminary ruling.

The Court held that "Community law cannot oblige a national court to apply Community legislation of its own motion where this would have the effect of denying the principle, enshrined in its national procedural law, of the prohibition of *reformatio in pejus*". The decision therefore points clearly to the primacy of the procedural autonomy of the Member States, to the detriment of the primacy of Community law.

It should be noted that this decision attracted attention because the issue of the raising *proprio motu* of arguments based on a violation of Community law is addressed here from the angle of protection of the Community legal order.

#### Cross-references:

- CJEC, 01.06.1999, *Eco Swiss China Time Ltd v. Benetton International NV* (C-126/97, ECR, p. I-3055);
- CJEC, 14.12.1995, *Peterbroeck, Van Campenhout & Cie SCS v. Belgium State* (C-312/93, ECR, p. I-4599);
- CJEC, 14.12.1995, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* (C-430/93 and C-431/93, ECR, p. I-4705).

#### Languages:

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



#### Identification: ECJ-2010-2-014

**a)** European Union / **b)** Court of First Instance / **c)** Seventh Chamber / **d)** 04.12.2008 / **e)** T-284/08 / **f)** / People's Mojahedin Organisation of Iran v. Council of the European Union / **g)** *European Court Reports*, II-03487 / **h)** CODICES (English, French).

#### Keywords of the systematic thesaurus:

3.17 General Principles – **Weighing of interests.**  
 5.1.4 Fundamental Rights – General questions – **Limits and restrictions.**  
 5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Access to courts.**  
 5.3.13.6 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to a hearing.**  
 5.3.13.14 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Independence.**  
 5.3.13.15 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Impartiality.**  
 5.3.13.25 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – **Right to be informed about the charges.**

#### Keywords of the alphabetical index:

Terrorism, fight, fundamental rights, protection, weighing / Terrorism, assets, freeze, procedure, guarantee / Terrorism, suspect, fair hearing.

#### Headnotes:

1. The Council adopted Decision 2008/583 implementing Article 2.3 of Regulation no. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating

terrorism without first informing the interested party of the new information or new material in the file which, in its view, justified maintaining it on the list of persons, groups and bodies whose funds had to be frozen. A fortiori, it did not enable that party to effectively make known its view of the matter, prior to the adoption of that decision.

The Council acted in that way even though urgency is not in any way established, and it does not cite any material or legal obstacle to communicating to the interested party the 'new material' which it claims justified it being kept on the list.

Therefore, the continued freezing of the interested party's funds by Decision 2008/583 was the result of a procedure during which that party's rights were not respected. That finding cannot but lead to the annulment of the contested decision, in so far as it concerns the interested party (see paragraphs 36, 40-41, 47).

2. The Council's omission to comply in the present case with a procedure clearly defined in an earlier judgment involving the same parties and designed to ensure compliance with defence rights, such omission being made with full knowledge of the facts and without any reasonable justification, may be material to any consideration of a plea based on the exceeding or misuse of powers (see paragraph 44).

3. The procedure which may culminate in a measure to freeze funds under the rules concerning specific measures with a view to combating terrorism takes place at two levels, one national, the other Community.

Under Article 10 EC, relations between the Member States and the Community institutions are governed by reciprocal duties to cooperate in good faith. In a case of application of Article 1.4 of Common Position 2001/931 on the application of specific measures to combat terrorism and Article 2.3 of Regulation no. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, provisions which introduce a specific form of cooperation between the Council and the Member States in the context of combating terrorism, that principle entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, in particular in respect of the existence of 'serious and credible evidence or clues' on which its decision, referred to in Article 1.4 of Common Position 2001/931, is based.

It follows from the foregoing that, although it is indeed for the Council to prove that freezing of the funds of a person, group or entity is or remains legally justified, in the light of the relevant legislation, that burden of proof has a relatively limited purpose in respect of the Community procedure for freezing funds. In the case of an initial decision to freeze funds, the burden of proof essentially relates to the existence of precise information or material in the relevant file which indicates that a decision by a national authority meeting the definition laid down in Article 1.4 of Common Position 2001/931 has been taken with regard to the person concerned. Furthermore, in the case of a subsequent decision to freeze funds, after review, the burden of proof essentially relates to whether the freezing of funds is still justified, having regard to all the relevant circumstances of the case and, most particularly, to the action taken upon that decision of the competent national authority (see paragraphs 51-54).

4. The Council has broad discretion as to what to take into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60, 301 and 308 EC, consistent with a common position adopted on the basis of the common foreign and security policy. This discretion concerns, in particular, the assessment of the considerations of appropriateness on which such decisions are based.

However, although the Court acknowledges that the Council possesses broad discretion in that sphere, that does not mean that the Court is not to review the interpretation made by the Council of the relevant facts. The Community judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it. However, when conducting such a review, it must not substitute its own assessment of what is appropriate for that of the Council (see paragraph 55).

5. The literal wording of Article 1.4 of Common Position 2001/931 on the application of specific measures to combat terrorism provides that a decision must have been taken 'in respect of the persons, groups and entities concerned' before a Community measure freezing funds can be adopted against them.

Even assuming that one should not follow a literal interpretation of that provision, if a national decision preceding the adoption of a Community measure has been taken not against an organisation but against some of its members, it would still be necessary that the

Council or the competent national authority concerned should provide an explanation as to the actual and specific reasons why, in the circumstances of the case, the acts ascribed to individuals allegedly members or supporters of an organisation should be imputed to the organisation itself (see paragraphs 64-65).

6. The Council is not entitled to base a funds-freezing decision under Article 2.3 of Regulation no. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision.

In that regard, the judicial review of the lawfulness of a decision to freeze funds extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based. The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in order to justify disregarding those rights.

That review is all the more essential because it constitutes the only safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. Since the restrictions imposed by the Council on the rights of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial, the Community courts must be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential.

Thus, refusal by the Council and by national authorities to communicate, even to the Court alone, the information contained in a document sent by those authorities to the Council has the consequence that the Court is unable to review the lawfulness of the funds-freezing decision (see paragraphs 73-76).

### Summary:

Decision no. 2008/583/EC of the Council of the European Union of 15 July 2008 upheld the decision of 2 May 2002 to keep the *People's Mojahedin Organisation of Iran* (PMOI) on the Community list of persons and entities whose funds must be frozen as part of the fight against terrorism. The *People's Mojahedin Organisation of Iran* was therefore kept on

that list. However, the Council decision of 2 May 2002 was based on an order by the British Home Secretary, and the *Proscribed Organisations Appeals Commission* had meanwhile ordered the removal of the PMOI from the British list of terrorist organisations.

The Council nevertheless kept the PMOI on the list on the ground that new information concerning that group had been brought to its attention. The Council was actually referring to the opening of a judicial inquiry by the anti-terrorist prosecutor's office of the court of first instance of Paris in April 2001 and to two supplementary charges brought against alleged members of the PMOI in March and November 2007. According to the Council, these measures constituted a decision by a competent national judicial authority on the basis of which the PMOI's funds could be frozen at Community level, in accordance with Council Regulation no. 2580/583/EC and Common Position 2001/931/CFSP.

The *People's Mojahedin Organisation of Iran* applied to the Court of First Instance of the European Communities for annulment of this decision.

II. The Court noted that the Council had adopted the contested decision without first informing the applicant of the new information or new material in the file which, in its view, justified maintaining it on the list. Consequently, the PMOI was unable to effectively make known its view of the matter prior to the adoption of the contested decision. The Court therefore found that the contested decision had been adopted in disregard of the PMOI's defence rights and annulled the decision to freeze its funds.

The Court examined two further pleas raised by the applicant "having regard to their importance in relation to the fundamental right to effective judicial protection". It pointed out that the Council has broad discretion as to what to take into consideration for the purpose of adopting economic and financial sanctions consistent with a common position adopted on the basis of the common foreign policy. However, the judicial review of the lawfulness of a decision to freeze funds extends to the assessment of the facts and circumstances relied on as justifying it, and to verification of the evidence and information on which that assessment is based, although the Court may of course not substitute its own assessment of what is appropriate for that of the Council.

### Cross-references:

- CFI, 26.04.2005, *Jose Maria Sison v. Council of the European Union* (Joint Cases T-110/03, T-150/03 and T-405/03).

*Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

*Identification:* ECJ-2010-2-015

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 16.12.2008 / **e)** C-524/06 / **f)** / Heinz Huber v. Bundesrepublik Deutschland / **g)** *European Court Reports*, I-09705 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

5.1.1.2 Fundamental Rights – General questions – Entitlement to rights – **Citizens of the European Union and non-citizens with similar status.**  
 5.2.2.4 Fundamental Rights – Equality – Criteria of distinction – **Citizenship or nationality.**  
 5.3.32.1 Fundamental Rights – Civil and political rights – Right to private life – **Protection of personal data.**

*Keywords of the alphabetical index:*

Foreigner, register of foreigners, justification / Crime, fight, justification for register of foreigners / Date, protection, discrimination of foreigners.

*Headnotes:*

Article 12.1 EC must be interpreted as meaning that it precludes the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to Union citizens who are not nationals of that Member State.

The principle of non-discrimination, which has its basis in Articles 12 or 43 EC, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. Such treatment may be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the objective being legitimately pursued.

While it is true that the objective of fighting crime is a legitimate one, it cannot be relied on in order to justify the systematic processing of personal data when that processing is restricted to the data of Union citizens who are not nationals of the Member State concerned. The fight against crime necessarily involves the prosecution of crimes and offences committed, irrespective of the nationality of their perpetrators. It follows that, as regards a Member State, the situation of its nationals cannot, as regards the objective of fighting crime, be different from that of Union citizens who are not nationals of that Member State and who are resident in its territory. Therefore, a difference in treatment between those nationals and those Union citizens which arises by virtue of the systematic processing of personal data relating only to Union citizens who are not nationals of the Member State concerned for the purposes of fighting crime constitutes discrimination which is prohibited by Article 12.1 EC (see paragraphs 75, 77-81, operative part 2).

*Summary:*

I. German law has established a centralised register of foreign nationals residing in German territory for a period of more than three months. This register is used for statistical purposes and for security reasons.

Considering himself to be discriminated against by reason of the data concerning him contained in the centralised register and, in particular, because such a database does not exist in respect of German nationals, an Austrian national requested the deletion of the data concerning him. The Higher Administrative Court of the *Land* of North Rhine-Westphalia, to which the case had been referred, ask the Court of Justice for a ruling on the compatibility with Community law of a centralised register of foreign nationals containing personal data relating to Union citizens who are not German nationals.

II. The Court applied the criterion of the purpose of such registers. Personal data may only be collected by the competent authorities for certain explicit lawful purposes in the context of their tasks and may only be processed for the purposes for which they were collected.

The Court points out that the right of a Union citizen to reside in the territory of a Member State of which he/she is not a national is not unconditional. It infers from this that the Member States are entitled to set up databases enabling the competent authorities to determine that the conditions for entitlement to a right of residence are satisfied. The Court adds that it is unnecessary to collect and store individualised personal information. In view of the register's statistical purpose, only anonymous data need to be processed.

The security function of the register, as a tool for fighting crime, is subject to the requirements of Articles 12 and 18 EC. The Court states that the legitimate objective of protecting public order cannot be relied upon to justify the processing of data concerning only Union citizens who are not nationals of the Member State in question, because the fight against crime necessarily involves the prosecution of crimes and offences committed, irrespective of the nationality of their perpetrators. The situation of the nationals of a Member State cannot, as regards the objective of fighting crime, be different from that of Union citizens who are not nationals of that Member State and who are resident in its territory.

#### *Languages:*

Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.



## European Court of Human Rights

### Important decisions

*Identification:* ECH-2010-2-003

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 22.12.2009 / **e)** 27996/06 and 34836/06 / **f)** Sejdić and Finci v. Bosnia and Herzegovina / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (French).

#### *Keywords of the systematic thesaurus:*

5.2.1.4 Fundamental Rights – Equality – Scope of application – **Elections**.

5.2.2.3 Fundamental Rights – Equality – Criteria of distinction – **Ethnic origin**.

5.3.29.1 Fundamental Rights – Civil and political rights – Right to participate in public affairs – **Right to participate in political activity**.

5.3.41.2 Fundamental Rights – Civil and political rights – Electoral rights – **Right to stand for election**.

#### *Keywords of the alphabetical index:*

Discrimination / Election, ineligibility / Election, candidate, condition / General Framework Agreement (Dayton).

#### *Headnotes:*

Discrimination based solely on a person's race cannot be objectively justified. While exclusion of persons of certain ethnicity from election to Parliament may pursue an aim broadly compatible with the general objectives of the Convention, namely that of the restoration of peace, in the context of constitutional provisions designed to end a brutal conflict marked by genocide and "ethnic cleansing", but no longer has an objective and reasonable justification once significant positive developments have taken place.

The notions of discrimination prohibited by Article 14 CEDH and by Article 1 Protocol 12 ECHR are to be interpreted in the same manner.

*Summary:*

The applicants, who are both citizens of Bosnia and Herzegovina, are respectively of Roma and Jewish origin and hold prominent public positions. The first applicant was the Roma Monitor of the OSCE mission to Bosnia and Herzegovina, while the second applicant was the Ambassador of Bosnia and Herzegovina to Switzerland. Under the 1995 Constitution of Bosnia and Herzegovina – which formed an annex to the 1995 Dayton Peace Agreement – only Bosniacs, Croats and Serbs, described as “constituent peoples”, were eligible to stand for election to the tripartite State presidency and the upper chamber of the State Parliament, the House of Peoples. The applicants complained that, despite possessing experience comparable to the highest elected officials in the country, they were prevented by the Constitution from being candidates for such posts solely on the grounds of their ethnic origin.

In their application to the Court, the applicants complained that their ineligibility to stand for election to the House of Peoples and the Presidency on the grounds of their Roma and Jewish origin amounted to racial discrimination. They relied on Article 14 ECHR, Article 3 Protocol 1 ECHR and Article 1 Protocol 12 ECHR.

As the House of Peoples is composed of members appointed by the legislature of the two Entities of Bosnia and Herzegovina and enjoys wide powers to control the passing of legislation, election to the upper chamber of the Parliament fell within the ambit of Article 3 Protocol 1 ECHR. The Court reiterated that discrimination based solely on a person’s race could not be objectively justified in today’s democratic society. The applicants, who described themselves as being of Roma and Jewish origin respectively and who did not wish to declare affiliation with a “constituent people”, were, as a result of constitutional provisions, excluded from standing for election to the House of Peoples. Such exclusion pursued an aim broadly compatible with the general objectives of the Convention, namely that of the restoration of peace. When the impugned constitutional provisions were put in place they were designed to end a brutal conflict marked by genocide and “ethnic cleansing”. The nature of the conflict was such that the approval of the “constituent peoples” was necessary to ensure peace. This could explain the absence of representatives of the other communities – such as local Roma and Jewish communities – at the peace negotiations and the participants’ preoccupation with effective equality between the “constituent peoples” in the post-conflict society. However, the Court could not but observe the

significant positive developments in Bosnia and Herzegovina after the Dayton Peace Agreement: in 2005 the former parties to the conflict had surrendered their control over the armed forces and transformed them into a small professional force; in 2006 Bosnia and Herzegovina had joined NATO’s Partnership for Peace; in 2008 it had signed and ratified a Stabilisation and Association Agreement with the European Union; in March 2009 it had successfully amended the State Constitution for the first time; and it had recently been elected a member of the UN Security Council for a two-year term starting in January 2010. Moreover, by ratifying the Convention and its Protocols thereto in 2002 without any reservations, the respondent State had specifically undertaken to review, within one year, its electoral legislation with the help of the Venice Commission, and to bring it in line with the Council of Europe standards where necessary. A similar commitment had also been given when ratifying the Stabilisation and Association Agreement. Lastly, while it was true that the Convention itself did not require the respondent State to totally abandon the peculiar power-sharing system, the opinions of the Venice Commission clearly demonstrated the existence of other mechanisms of power-sharing which did not automatically lead to the total exclusion of representatives of the other communities. In conclusion, the applicants’ continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacked objective and reasonable justification. There had therefore been a violation of Article 14 ECHR in conjunction with Article 3 Protocol 1 ECHR.

Whereas Article 14 ECHR prohibited discrimination in the enjoyment of “the rights and freedoms set forth in [the] Convention”, Article 1 Protocol 12 ECHR extended the scope of protection to “any right set forth by law”, thus introducing a general prohibition of discrimination. Therefore, whether or not elections to the Presidency fell within the scope of Article 3 Protocol 1 ECHR, this complaint concerned a “right set forth by law” and Article 1 Protocol 12 ECHR was consequently applicable. The lack of a declaration of affiliation by the present applicants with a “constituent people” had also rendered them ineligible to stand for election to the Presidency. Since the notions of discrimination prohibited by Article 14 ECHR and by Article 1 Protocol 12 ECHR were to be interpreted in the same manner, for the same reasons the constitutional provisions which had rendered the applicants ineligible for election to the Presidency must also be considered discriminatory. There had therefore been a violation of Article 1 Protocol 12 ECHR.

**Cross-references:**

- Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Merits), 23.07.1968, Series A, no. 6; *Special Bulletin Leading Cases ECHR* [ECH-1968-S-003];
- *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28.05.1985, Series A, no. 94; *Special Bulletin Leading Cases ECHR* [ECH-1985-S-002];
- *Mathieu-Mohin and Clerfayt v. Belgium*, 02.03.1987, Series A, no. 113; *Special Bulletin Leading Cases ECHR* [ECH-1987-S-001];
- *Petrovic v. Austria*, 27.03.1998, *Reports of Judgments and Decisions 1998-II*; *Bulletin 1998/1* [ECH-1998-1-006];
- *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I; *Bulletin 1999/1* [ECH-1999-1-004];
- *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV; *Bulletin 2000/1* [ECH-2000-1-004];
- *Şahin v. Germany* [GC], no. 30943/96, ECHR 2003-VIII;
- *Boškoski v. "the former Yugoslav Republic of Macedonia"* (dec.), no. 11676/04, ECHR 2004-VI;
- *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, ECHR 2005-VII;
- *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X;
- *Timishev v. Russia*, nos. 55762/00 and 55974/00, ECHR 2005-XII;
- *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-XII;
- *E.B. v. France* [GC], no. 43546/02, ECHR 2008;
- *Andrejeva v. Latvia* [GC], no. 55707/00, 18.02.2009;
- *Glor v. Switzerland*, no. 13444/04, 30.04.2009.

**Languages:**

English, French.





## **Systematic thesaurus (V20) \***

\* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

### **1 Constitutional Justice<sup>1</sup>**

#### **1.1 Constitutional jurisdiction<sup>2</sup>**

- 1.1.1 Statute and organisation
  - 1.1.1.1 Sources
    - 1.1.1.1.1 Constitution
    - 1.1.1.1.2 Institutional Acts
    - 1.1.1.1.3 Other legislation
    - 1.1.1.1.4 Rule issued by the executive
    - 1.1.1.1.5 Rule adopted by the Court<sup>3</sup>
  - 1.1.1.2 Independence
    - 1.1.1.2.1 Statutory independence
    - 1.1.1.2.2 Administrative independence
    - 1.1.1.2.3 Financial independence
- 1.1.2 Composition, recruitment and structure
  - 1.1.2.1 Necessary qualifications<sup>4</sup>
  - 1.1.2.2 Number of members
  - 1.1.2.3 Appointing authority
  - 1.1.2.4 Appointment of members<sup>5</sup>
  - 1.1.2.5 Appointment of the President<sup>6</sup>
  - 1.1.2.6 Functions of the President / Vice-President
  - 1.1.2.7 Subdivision into chambers or sections
  - 1.1.2.8 Relative position of members<sup>7</sup>
  - 1.1.2.9 Persons responsible for preparing cases for hearing<sup>8</sup>
  - 1.1.2.10 Staff<sup>9</sup>
    - 1.1.2.10.1 Functions of the Secretary General / Registrar
    - 1.1.2.10.2 Legal Advisers
- 1.1.3 Status of the members of the court .....**335**
  - 1.1.3.1 Term of office of Members
  - 1.1.3.2 Term of office of the President
  - 1.1.3.3 Privileges and immunities
  - 1.1.3.4 Professional incompatibilities
  - 1.1.3.5 Disciplinary measures
  - 1.1.3.6 Remuneration
  - 1.1.3.7 Non-disciplinary suspension of functions
  - 1.1.3.8 End of office
  - 1.1.3.9 Members having a particular status<sup>10</sup>

<sup>1</sup> This chapter – as the Systematic Thesaurus in general – should be used sparingly, as the keywords therein should only be used if a relevant procedural question is discussed by the Court. This chapter is therefore not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only look for decisions in this chapter, the subject of which is also the keyword.

<sup>2</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

<sup>3</sup> For example, rules of procedure.

<sup>4</sup> For example, age, education, experience, seniority, moral character, citizenship.

<sup>5</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>6</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>7</sup> Vice-presidents, presidents of chambers or of sections, etc.

<sup>8</sup> For example, State Counsel, prosecutors, etc.

<sup>9</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>10</sup> For example, assessors, office members.

	1.1.3.10	Status of staff <sup>11</sup>	
1.1.4		Relations with other institutions	
	1.1.4.1	Head of State <sup>12</sup>	
	1.1.4.2	Legislative bodies .....	124
	1.1.4.3	Executive bodies	
	1.1.4.4	Courts .....	367
1.2		<b>Types of claim</b>	
1.2.1		Claim by a public body	
	1.2.1.1	Head of State	
	1.2.1.2	Legislative bodies	
	1.2.1.3	Executive bodies .....	95, 161
	1.2.1.4	Organs of federated or regional authorities	
	1.2.1.5	Organs of sectoral decentralisation	
	1.2.1.6	Local self-government body	
	1.2.1.7	Public Prosecutor or Attorney-General	
	1.2.1.8	Ombudsman	
	1.2.1.9	Member states of the European Union	
	1.2.1.10	Institutions of the European Union	
	1.2.1.11	Religious authorities	
1.2.2		Claim by a private body or individual	
	1.2.2.1	Natural person .....	17, 202
	1.2.2.2	Non-profit-making corporate body .....	17, 42
	1.2.2.3	Profit-making corporate body	
	1.2.2.4	Political parties	
	1.2.2.5	Trade unions .....	124
1.2.3		Referral by a court <sup>13</sup>	
1.2.4		Initiation ex officio by the body of constitutional jurisdiction	
1.2.5		Obligatory review <sup>14</sup> .....	385
1.3		<b>Jurisdiction</b> .....	17, 119
1.3.1		Scope of review .....	367
	1.3.1.1	Extension <sup>15</sup>	
1.3.2		Type of review	
	1.3.2.1	Preliminary / <i>ex post facto</i> review .....	81, 385
	1.3.2.2	Abstract / concrete review	
1.3.3		Advisory powers	
1.3.4		Types of litigation	
	1.3.4.1	Litigation in respect of fundamental rights and freedoms	
	1.3.4.2	Distribution of powers between State authorities <sup>16</sup> .....	161
	1.3.4.3	Distribution of powers between central government and federal or regional entities <sup>17</sup> .....	370
	1.3.4.4	Powers of local authorities <sup>18</sup> .....	385
	1.3.4.5	Electoral disputes <sup>19</sup>	
	1.3.4.6	Litigation in respect of referendums and other instruments of direct democracy <sup>20</sup> .....	361
		1.3.4.6.1 Admissibility	
		1.3.4.6.2 Other litigation	
	1.3.4.7	Restrictive proceedings	
		1.3.4.7.1 Banning of political parties	

<sup>11</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

<sup>12</sup> Including questions on the interim exercise of the functions of the Head of State.

<sup>13</sup> Referrals of preliminary questions in particular.

<sup>14</sup> Enactment required by law to be reviewed by the Court.

<sup>15</sup> Review *ultra petita*.

<sup>16</sup> Horizontal distribution of powers.

<sup>17</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>18</sup> Decentralised authorities (municipalities, provinces, etc.).

<sup>19</sup> For questions other than jurisdiction, see 4.9.

<sup>20</sup> Including other consultations. For questions other than jurisdiction, see 4.9.

	1.3.4.7.2	Withdrawal of civil rights	
	1.3.4.7.3	Removal from parliamentary office	
	1.3.4.7.4	Impeachment	
	1.3.4.8	Litigation in respect of jurisdictional conflict	
	1.3.4.9	Litigation in respect of the formal validity of enactments <sup>21</sup>	
	1.3.4.10	Litigation in respect of the constitutionality of enactments.....	124, 367
	1.3.4.10.1	Limits of the legislative competence	
	1.3.4.11	Litigation in respect of constitutional revision	
	1.3.4.12	Conflict of laws <sup>22</sup>	
	1.3.4.13	Universally binding interpretation of laws.....	161
	1.3.4.14	Distribution of powers between Community and member states	
	1.3.4.15	Distribution of powers between institutions of the Community	
1.3.5		The subject of review	
	1.3.5.1	International treaties .....	264
	1.3.5.2	Community law .....	289
	1.3.5.2.1	Primary legislation	
	1.3.5.2.2	Secondary legislation	
	1.3.5.3	Constitution <sup>23</sup>	
	1.3.5.4	Quasi-constitutional legislation <sup>24</sup> .....	370
	1.3.5.5	Laws and other rules having the force of law	
	1.3.5.5.1	Laws and other rules in force before the entry into force of the Constitution	
	1.3.5.6	Decrees of the Head of State	
	1.3.5.7	Quasi-legislative regulations	
	1.3.5.8	Rules issued by federal or regional entities	
	1.3.5.9	Parliamentary rules	
	1.3.5.10	Rules issued by the executive	
	1.3.5.11	Acts issued by decentralised bodies	
	1.3.5.11.1	Territorial decentralisation <sup>25</sup>	
	1.3.5.11.2	Sectoral decentralisation <sup>26</sup>	
	1.3.5.12	Court decisions	
	1.3.5.13	Administrative acts	
	1.3.5.14	Government acts <sup>27</sup>	
	1.3.5.15	Failure to act or to pass legislation <sup>28</sup> .....	253, 402
1.4		<b>Procedure</b>	
	1.4.1	General characteristics <sup>29</sup>	
	1.4.2	Summary procedure	
	1.4.3	Time-limits for instituting proceedings	
	1.4.3.1	Ordinary time-limit	
	1.4.3.2	Special time-limits	
	1.4.3.3	Leave to appeal out of time	
	1.4.4	Exhaustion of remedies	
	1.4.5	Originating document	
	1.4.5.1	Decision to act <sup>30</sup>	
	1.4.5.2	Signature	
	1.4.5.3	Formal requirements	

<sup>21</sup> Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

<sup>22</sup> As understood in private international law.

<sup>23</sup> Including constitutional laws.

<sup>24</sup> For example, organic laws.

<sup>25</sup> Local authorities, municipalities, provinces, departments, etc.

<sup>26</sup> Or: functional decentralisation (public bodies exercising delegated powers).

<sup>27</sup> Political questions.

<sup>28</sup> Unconstitutionality by omission.

<sup>29</sup> Including language issues relating to procedure, deliberations, decisions, etc.

<sup>30</sup> For the withdrawal of proceedings, see also 1.4.10.4.

	1.4.5.4	Annexes	
	1.4.5.5	Service	
1.4.6	Grounds		
	1.4.6.1	Time-limits	
	1.4.6.2	Form	
	1.4.6.3	<i>Ex-officio</i> grounds	
1.4.7	Documents lodged by the parties <sup>31</sup>		
	1.4.7.1	Time-limits	
	1.4.7.2	Decision to lodge the document	
	1.4.7.3	Signature	
	1.4.7.4	Formal requirements	
	1.4.7.5	Annexes	
	1.4.7.6	Service	
1.4.8	Preparation of the case for trial		
	1.4.8.1	Registration	
	1.4.8.2	Notifications and publication	
	1.4.8.3	Time-limits	
	1.4.8.4	Preliminary proceedings .....	<b>290</b>
	1.4.8.5	Opinions	
	1.4.8.6	Reports	
	1.4.8.7	Evidence	
		1.4.8.7.1 Inquiries into the facts by the Court	
	1.4.8.8	Decision that preparation is complete	
1.4.9	Parties		
	1.4.9.1	<i>Locus standi</i> <sup>32</sup> .....	42
	1.4.9.2	Interest .....	17, 256, 257
	1.4.9.3	Representation	
		1.4.9.3.1 The Bar	
		1.4.9.3.2 Legal representation other than the Bar	
		1.4.9.3.3 Representation by persons other than lawyers or jurists	
	1.4.9.4	Persons or entities authorised to intervene in proceedings .....	17
1.4.10	Interlocutory proceedings		
	1.4.10.1	Intervention	
	1.4.10.2	Plea of forgery	
	1.4.10.3	Resumption of proceedings after interruption	
	1.4.10.4	Discontinuance of proceedings <sup>33</sup>	
	1.4.10.5	Joinder of similar cases	
	1.4.10.6	Challenging of a judge	
		1.4.10.6.1 Automatic disqualification	
		1.4.10.6.2 Challenge at the instance of a party	
	1.4.10.7	Request for a preliminary ruling by the Court of Justice of the European Communities	
1.4.11	Hearing		
	1.4.11.1	Composition of the bench	
	1.4.11.2	Procedure	
	1.4.11.3	In public / in camera	
	1.4.11.4	Report	
	1.4.11.5	Opinion	
	1.4.11.6	Address by the parties	
1.4.12	Special procedures		
1.4.13	Re-opening of hearing		
1.4.14	Costs <sup>34</sup>		
	1.4.14.1	Waiver of court fees	
	1.4.14.2	Legal aid or assistance	
	1.4.14.3	Party costs	

<sup>31</sup> Pleadings, final submissions, notes, etc.

<sup>32</sup> May be used in combination with Chapter 1.2 Types of claim.

<sup>33</sup> For the withdrawal of the originating document, see also 1.4.5.

<sup>34</sup> Comprises court fees, postage costs, advance of expenses and lawyers' fees.

1.5	<b>Decisions</b>	
1.5.1	Deliberation	
1.5.1.1	Composition of the bench	
1.5.1.2	Chair	
1.5.1.3	Procedure	
1.5.1.3.1	Quorum	
1.5.1.3.2	Vote	
1.5.2	Reasoning	
1.5.3	Form	
1.5.4	Types	
1.5.4.1	Procedural decisions	
1.5.4.2	Opinion.....	161
1.5.4.3	Finding of constitutionality or unconstitutionality <sup>35</sup> .....	<b>370</b>
1.5.4.4	Annulment.....	<b>370</b>
1.5.4.4.1	Consequential annulment	
1.5.4.5	Suspension	
1.5.4.6	Modification.....	<b>367</b>
1.5.4.7	Interim measures	
1.5.5	Individual opinions of members	
1.5.5.1	Concurring opinions	
1.5.5.2	Dissenting opinions	
1.5.6	Delivery and publication	
1.5.6.1	Delivery	
1.5.6.2	Time limit	
1.5.6.3	Publication	
1.5.6.3.1	Publication in the official journal/gazette	
1.5.6.3.2	Publication in an official collection	
1.5.6.3.3	Private publication	
1.5.6.4	Press	
1.6	<b>Effects</b>	
1.6.1	Scope	
1.6.2	Determination of effects by the court .....	32
1.6.3	Effect erga omnes	
1.6.3.1	<i>Stare decisis</i> .....	<b>255, 392</b>
1.6.4	Effect inter partes	
1.6.5	Temporal effect	
1.6.5.1	Entry into force of decision	
1.6.5.2	Retrospective effect ( <i>ex tunc</i> )	
1.6.5.3	Limitation on retrospective effect	
1.6.5.4	<i>Ex nunc</i> effect	
1.6.5.5	Postponement of temporal effect .....	<b>290</b>
1.6.6	Execution .....	<b>361</b>
1.6.6.1	Body responsible for supervising execution	
1.6.6.2	Penalty payment	
1.6.7	Influence on State organs	
1.6.8	Influence on everyday life	
1.6.9	Consequences for other cases	
1.6.9.1	Ongoing cases .....	<b>290, 292, 367</b>
1.6.9.2	Decided cases .....	193

35

For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

## 2 Sources

### 2.1 Categories<sup>36</sup>

- 2.1.1 Written rules
- 2.1.1.1 National rules
- 2.1.1.1.1 Constitution
- 2.1.1.1.2 Quasi-constitutional enactments<sup>37</sup>
- 2.1.1.2 National rules from other countries
- 2.1.1.3 Community law .....17, 21, 74, **405**
- 2.1.1.4 International instruments.....**279, 402**
- 2.1.1.4.1 United Nations Charter of 1945 .....122, 202
- 2.1.1.4.2 Universal Declaration of Human Rights of 1948
- 2.1.1.4.3 Geneva Conventions of 1949
- 2.1.1.4.4 European Convention on Human Rights of 1950<sup>38</sup> .....7, 147, 176, 191  
..... 197, **260, 261, 314, 338, 362, 390**
- 2.1.1.4.5 Geneva Convention on the Status of Refugees of 1951 .....18, 82
- 2.1.1.4.6 European Social Charter of 1961
- 2.1.1.4.7 International Convention on the Elimination of all  
Forms of Racial Discrimination of 1965
- 2.1.1.4.8 International Covenant on Civil and Political Rights of 1966 .....94, **261**
- 2.1.1.4.9 International Covenant on Economic,  
Social and Cultural Rights of 1966 .....**261**
- 2.1.1.4.10 Vienna Convention on the Law of Treaties of 1969
- 2.1.1.4.11 American Convention on Human Rights of 1969
- 2.1.1.4.12 Convention on the Elimination of all Forms of  
Discrimination against Women of 1979 .....**261**
- 2.1.1.4.13 African Charter on Human and Peoples' Rights of 1981
- 2.1.1.4.14 European Charter of Local Self-Government of 1985 .....63
- 2.1.1.4.15 Convention on the Rights of the Child of 1989
- 2.1.1.4.16 Framework Convention for the Protection of National Minorities of 1995
- 2.1.1.4.17 Statute of the International Criminal Court of 1998
- 2.1.1.4.18 Charter of Fundamental Rights of the European Union of 2000
- 2.1.1.4.19 International conventions regulating diplomatic and consular relations
- 2.1.2 Unwritten rules
- 2.1.2.1 Constitutional custom
- 2.1.2.2 General principles of law
- 2.1.2.3 Natural law
- 2.1.3 Case-law
- 2.1.3.1 Domestic case-law .....118, 119, 191, **390**
- 2.1.3.2 International case-law
- 2.1.3.2.1 European Court of Human Rights .....145, 150, 191, **255, 257**  
..... **314, 362, 390**
- 2.1.3.2.2 Court of Justice of the European Communities
- 2.1.3.2.3 Other international bodies
- 2.1.3.3 Foreign case-law
- 2.2 Hierarchy
- 2.2.1 Hierarchy as between national and non-national sources .....**264**
- 2.2.1.1 Treaties and constitutions .....95, **279**
- 2.2.1.2 Treaties and legislative acts.....130, 202
- 2.2.1.3 Treaties and other domestic legal instruments
- 2.2.1.4 European Convention on Human Rights and constitutions
- 2.2.1.5 European Convention on Human Rights and  
non-constitutional domestic legal instruments .....122, 150

<sup>36</sup> Only for issues concerning applicability and not simple application.

<sup>37</sup> This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

<sup>38</sup> Including its Protocols.

2.2.1.6	Community law and domestic law.....	<b>289</b>
2.2.1.6.1	Primary Community legislation and constitutions	
2.2.1.6.2	Primary Community legislation and domestic non-constitutional legal instruments	
2.2.1.6.3	Secondary Community legislation and constitutions	
2.2.1.6.4	Secondary Community legislation and domestic non-constitutional instruments	
2.2.2	Hierarchy as between national sources	
2.2.2.1	Hierarchy emerging from the Constitution .....	42, <b>240</b>
2.2.2.1.1	Hierarchy attributed to rights and freedoms .....	130
2.2.2.2	The Constitution and other sources of domestic law .....	<b>370</b>
2.2.3	Hierarchy between sources of Community law	
2.3	<b>Techniques of review</b> .....	63, 169
2.3.1	Concept of manifest error in assessing evidence or exercising discretion	
2.3.2	Concept of constitutionality dependent on a specified interpretation <sup>39</sup> .....	<b>394</b>
2.3.3	Intention of the author of the enactment under review	
2.3.4	Interpretation by analogy.....	<b>320</b>
2.3.5	Logical interpretation	
2.3.6	Historical interpretation .....	<b>318, 320</b>
2.3.7	Literal interpretation .....	47
2.3.8	Systematic interpretation.....	182
2.3.9	Teleological interpretation .....	<b>320</b>
3	<b><u>General Principles</u></b>	
3.1	<b>Sovereignty</b> .....	95, <b>240, 311, 370</b>
3.2	<b>Republic/Monarchy</b> .....	95
3.3	<b>Democracy</b> .....	51, 179, <b>381</b>
3.3.1	Representative democracy .....	62
3.3.2	Direct democracy .....	<b>378</b>
3.3.3	Pluralist democracy <sup>40</sup> .....	<b>287</b>
3.4	<b>Separation of powers</b> .....	30, 47, 80, 82, 104, 118, 165, 169, <b>253, 270, 316, 323, 329, 332</b>
3.5	<b>Social State</b> <sup>41</sup> .....	69, <b>345</b>
3.6	<b>Structure of the State</b> <sup>42</sup> .....	<b>370</b>
3.6.1	Unitary State .....	62, 95
3.6.2	Regional State	
3.6.3	Federal State	
3.7	<b>Relations between the State and bodies of a religious or ideological nature</b> <sup>43</sup> .....	9, 94, 130, <b>282</b>
3.8	<b>Territorial principles</b> .....	<b>370</b>
3.8.1	Indivisibility of the territory	
3.9	<b>Rule of law</b> .....	52, 106, 141, 165, 202, <b>270, 275, 311, 381</b>
3.10	<b>Certainty of the law</b> <sup>44</sup> .....	49, 77, 81, 98, 126, 141, 153, 164, 179, <b>247, 251, 299, 303, 310, 318, 405, 411</b>

<sup>39</sup> Presumption of constitutionality, double construction rule.

<sup>40</sup> Including the principle of a multi-party system.

<sup>41</sup> Includes the principle of social justice.

<sup>42</sup> See also 4.8.

<sup>43</sup> Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

<sup>44</sup> Including maintaining confidence and legitimate expectations.

3.11	<b>Vested and/or acquired rights</b> .....	35
3.12	<b>Clarity and precision of legal provisions</b> .....	20, 35, 47, 63, 94, 126, 145, 164, <b>320, 320, 329, 356, 394</b>
3.13	<b>Legality</b> <sup>45</sup> .....	<b>248, 320, 405</b>
3.14	<b><i>Nullum crimen, nulla poena sine lege</i></b> <sup>46</sup> .....	20, 99, 114, <b>329, 405</b>
3.15	<b>Publication of laws</b>	
	3.15.1 Ignorance of the law is no excuse	
	3.15.2 Linguistic aspects	
3.16	<b>Proportionality</b> .....	5, 6, 16, 54, 60, 66, 82, 85, 99, 135, 145, 191, 198, <b>249, 261</b> ..... <b>275, 314, 318, 356, 373, 395, 405</b>
3.17	<b>Weighing of interests</b> .....	23, 59, 67, 72, 74, 85, 191, <b>267, 275, 341, 373, 412</b>
3.18	<b>General interest</b> <sup>47</sup> .....	34, 56, 85, 104, 117, 143, 153, 191
3.19	<b>Margin of appreciation</b> .....	9, 32, 34, 82, <b>318</b>
3.20	<b>Reasonableness</b> .....	5, 82, 121
3.21	<b>Equality</b> <sup>48</sup> .....	153, <b>313</b>
3.22	<b>Prohibition of arbitrariness</b> .....	<b>387</b>
3.23	<b>Equity</b> .....	<b>249</b>
3.24	<b>Loyalty to the State</b> <sup>49</sup>	
3.25	<b>Market economy</b> <sup>50</sup>	
3.26	<b>Principles of Community law</b>	
	3.26.1 Fundamental principles of the Common Market .....	196, 198, 199, <b>406</b>
	3.26.2 Direct effect <sup>51</sup> .....	194
	3.26.3 Genuine co-operation between the institutions and the member states .....	193, <b>409</b>
4	<b><u>Institutions</u></b>	
4.1	<b>Constituent assembly or equivalent body</b> <sup>52</sup>	
	4.1.1 Procedure .....	<b>329</b>
	4.1.2 Limitations on powers .....	137, <b>381</b>
4.2	<b>State Symbols</b>	
	4.2.1 Flag	
	4.2.2 National holiday	
	4.2.3 National anthem	
	4.2.4 National emblem	
	4.2.5 Motto	
	4.2.6 Capital city	

<sup>45</sup> Principle according to which sub-statutory acts must be based on and in conformity with the law.

<sup>46</sup> Prohibition of punishment without proper legal base.

<sup>47</sup> Including compelling public interest.

<sup>48</sup> Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

<sup>49</sup> Including questions of treason/high crimes.

<sup>50</sup> Including prohibition on monopolies.

<sup>51</sup> For the principle of primacy of Community law, see 2.2.1.6.

<sup>52</sup> Including the body responsible for revising or amending the Constitution.



4.3	<b>Languages</b>	
4.3.1	Official language(s) .....	91, <b>370, 374</b>
4.3.2	National language(s)	
4.3.3	Regional language(s)	
4.3.4	Minority language(s)	
4.4	<b>Head of State</b>	
4.4.1	Vice-President / Regent	
4.4.2	Temporary replacement	
4.4.3	Powers	
4.4.3.1	Relations with legislative bodies <sup>53</sup> .....	94, 118, <b>323, 328</b>
4.4.3.2	Relations with the executive bodies <sup>54</sup> .....	124, 161, 167, 184, <b>323</b>
4.4.3.3	Relations with judicial bodies <sup>55</sup> .....	167
4.4.3.4	Promulgation of laws	
4.4.3.5	International relations.....	124, <b>286</b>
4.4.3.6	Powers with respect to the armed forces.....	184, <b>286</b>
4.4.3.7	Mediating powers	
4.4.4	Appointment	
4.4.4.1	Necessary qualifications	
4.4.4.2	Incompatibilities	
4.4.4.3	Direct/indirect election	
4.4.4.4	Hereditary succession	
4.4.5	Term of office	
4.4.5.1	Commencement of office	
4.4.5.2	Duration of office	
4.4.5.3	Incapacity	
4.4.5.4	End of office	
4.4.5.5	Limit on number of successive terms	
4.4.6	Status	
4.4.6.1	Liability	
4.4.6.1.1	Legal liability	
4.4.6.1.1.1	Immunity.....	188
4.4.6.1.1.2	Civil liability	
4.4.6.1.1.3	Criminal liability .....	117
4.4.6.1.2	Political responsibility .....	124
4.5	<b>Legislative bodies<sup>56</sup></b>	
4.5.1	Structure <sup>57</sup>	
4.5.2	Powers <sup>58</sup> .....	5, 30, 47, 80, 118
4.5.2.1	Competences with respect to international agreements .....	<b>408</b>
4.5.2.2	Powers of enquiry <sup>59</sup> .....	<b>334</b>
4.5.2.3	Delegation to another legislative body <sup>60</sup>	
4.5.2.4	Negative incompetence <sup>61</sup>	
4.5.3	Composition	
4.5.3.1	Election of members	
4.5.3.2	Appointment of members	
4.5.3.3	Term of office of the legislative body	
4.5.3.3.1	Duration	

<sup>53</sup> For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

<sup>54</sup> For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

<sup>55</sup> For example, the granting of pardons.

<sup>56</sup> For regional and local authorities, see chapter 4.8.

<sup>57</sup> Bicameral, monocameral, special competence of each assembly, etc.

<sup>58</sup> Including specialised powers of each legislative body and reserved powers of the legislature.

<sup>59</sup> In particular, commissions of enquiry.

<sup>60</sup> For delegation of powers to an executive body, see keyword 4.6.3.2.

<sup>61</sup> Obligation on the legislative body to use the full scope of its powers.

4.5.3.4	Term of office of members	
4.5.3.4.1	Characteristics <sup>62</sup>	
4.5.3.4.2	Duration	
4.5.3.4.3	End	
4.5.4	Organisation <sup>63</sup>	
4.5.4.1	Rules of procedure	
4.5.4.2	President/Speaker .....	165
4.5.4.3	Sessions <sup>64</sup>	
4.5.4.4	Committees <sup>65</sup>	
4.5.5	Finances <sup>66</sup>	
4.5.6	Law-making procedure <sup>67</sup> .....	13, 14, 80, 364
4.5.6.1	Right to initiate legislation .....	47, 98
4.5.6.2	Quorum	
4.5.6.3	Majority required	
4.5.6.4	Right of amendment.....	47
4.5.6.5	Relations between houses.....	364
4.5.7	Relations with the executive bodies.....	5, 334
4.5.7.1	Questions to the government	
4.5.7.2	Questions of confidence	
4.5.7.3	Motion of censure	
4.5.8	Relations with judicial bodies .....	52, 316, 329
4.5.9	Liability .....	188, 402
4.5.10	Political parties	
4.5.10.1	Creation	
4.5.10.2	Financing	
4.5.10.3	Role	
4.5.10.4	Prohibition.....	173
4.5.11	Status of members of legislative bodies <sup>68</sup> .....	5, 336, 408, 409
4.6	<b>Executive bodies<sup>69</sup></b>	
4.6.1	Hierarchy	
4.6.2	Powers .....	5, 30, 32, 104, 121, 169, 328
4.6.3	Application of laws	
4.6.3.1	Autonomous rule-making powers <sup>70</sup> .....	80, 185
4.6.3.2	Delegated rule-making powers .....	57, 130
4.6.4	Composition	
4.6.4.1	Appointment of members	
4.6.4.2	Election of members	
4.6.4.3	End of office of members	
4.6.4.4	Status of members of executive bodies	
4.6.5	Organisation	
4.6.6	Relations with judicial bodies .....	118
4.6.7	Administrative decentralisation <sup>71</sup>	
4.6.8	Sectoral decentralisation <sup>72</sup>	
4.6.8.1	Universities .....	116, 239
4.6.9	The civil service <sup>73</sup> .....	141

<sup>62</sup> Representative/imperative mandates.

<sup>63</sup> Presidency, bureau, sections, committees, etc.

<sup>64</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>65</sup> Including their creation, composition and terms of reference.

<sup>66</sup> State budgetary contribution, other sources, etc.

<sup>67</sup> For the publication of laws, see 3.15.

<sup>68</sup> For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

<sup>69</sup> For local authorities, see 4.8.

<sup>70</sup> Derived directly from the Constitution.

<sup>71</sup> See also 4.8.

<sup>72</sup> The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

<sup>73</sup> Civil servants, administrators, etc.

4.6.9.1	Conditions of access	
4.6.9.2	Reasons for exclusion	
4.6.9.2.1	Lustration <sup>74</sup>	179
4.6.9.3	Remuneration	59, 341
4.6.9.4	Personal liability	
4.6.9.5	Trade union status	
4.6.10	Liability	
4.6.10.1	Legal liability	
4.6.10.1.1	Immunity	
4.6.10.1.2	Civil liability	29
4.6.10.1.3	Criminal liability	117
4.6.10.2	Political responsibility	124
4.7	<b>Judicial bodies<sup>75</sup></b>	
4.7.1	Jurisdiction	46, 329
4.7.1.1	Exclusive jurisdiction	147
4.7.1.2	Universal jurisdiction	
4.7.1.3	Conflicts of jurisdiction <sup>76</sup>	
4.7.2	Procedure	389
4.7.3	Decisions	
4.7.4	Organisation	
4.7.4.1	Members	
4.7.4.1.1	Qualifications	
4.7.4.1.2	Appointment	332
4.7.4.1.3	Election	
4.7.4.1.4	Term of office	325
4.7.4.1.5	End of office	153, 325
4.7.4.1.6	Status	
4.7.4.1.6.1	Incompatibilities	332
4.7.4.1.6.2	Discipline	
4.7.4.1.6.3	Irremovability	
4.7.4.2	Officers of the court	
4.7.4.3	Prosecutors / State counsel <sup>77</sup>	
4.7.4.3.1	Powers	143, 281
4.7.4.3.2	Appointment	
4.7.4.3.3	Election	
4.7.4.3.4	Term of office	
4.7.4.3.5	End of office	
4.7.4.3.6	Status	
4.7.4.4	Languages	374
4.7.4.5	Registry	
4.7.4.6	Budget	52, 316
4.7.5	Supreme Judicial Council or equivalent body <sup>78</sup>	370, 381
4.7.6	Relations with bodies of international jurisdiction	
4.7.7	Supreme court	242, 370
4.7.8	Ordinary courts	52, 324
4.7.8.1	Civil courts	389
4.7.8.2	Criminal courts	151
4.7.9	Administrative courts	147, 323
4.7.10	Financial courts <sup>79</sup>	
4.7.11	Military courts	98
4.7.12	Special courts	

<sup>74</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

<sup>75</sup> Other than the body delivering the decision summarised here.

<sup>76</sup> Positive and negative conflicts.

<sup>77</sup> Notwithstanding the question to which to branch of state power the prosecutor belongs.

<sup>78</sup> For example, Judicial Service Commission, *Haut Conseil de la Justice*, etc.

<sup>79</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

4.7.13	Other courts	
4.7.14	Arbitration	
4.7.15	Legal assistance and representation of parties	
4.7.15.1	The Bar	25
4.7.15.1.1	Organisation	
4.7.15.1.2	Powers of ruling bodies	
4.7.15.1.3	Role of members of the Bar	
4.7.15.1.4	Status of members of the Bar	
4.7.15.1.5	Discipline	
4.7.15.2	Assistance other than by the Bar	
4.7.15.2.1	Legal advisers	
4.7.15.2.2	Legal assistance bodies	
4.7.16	Liability	
4.7.16.1	Liability of the State	
4.7.16.2	Liability of judges	
<b>4.8</b>	<b>Federalism, regionalism and local self-government</b>	
4.8.1	Federal entities <sup>80</sup>	
4.8.2	Regions and provinces	
4.8.3	Municipalities <sup>81</sup>	63, 366
4.8.4	Basic principles	
4.8.4.1	Autonomy	40, 62, 63, 366, 370
4.8.4.2	Subsidiarity	34, 56
4.8.5	Definition of geographical boundaries	
4.8.6	Institutional aspects	
4.8.6.1	Deliberative assembly	
4.8.6.1.1	Status of members	
4.8.6.2	Executive	107
4.8.6.3	Courts	
4.8.7	Budgetary and financial aspects	370
4.8.7.1	Finance	63
4.8.7.2	Arrangements for distributing the financial resources of the State	63
4.8.7.3	Budget	63
4.8.7.4	Mutual support arrangements	
4.8.8	Distribution of powers	364
4.8.8.1	Principles and methods	63, 107, 257, 366, 370
4.8.8.2	Implementation	
4.8.8.2.1	Distribution <i>ratione materiae</i>	56, 257
4.8.8.2.2	Distribution <i>ratione loci</i>	
4.8.8.2.3	Distribution <i>ratione temporis</i>	
4.8.8.2.4	Distribution <i>ratione personae</i>	
4.8.8.3	Supervision	
4.8.8.4	Co-operation	
4.8.8.5	International relations	
4.8.8.5.1	Conclusion of treaties	
4.8.8.5.2	Participation in international organisations or their organs	370
<b>4.9</b>	<b>Elections and instruments of direct democracy<sup>82</sup></b>	
4.9.1	Competent body for the organisation and control of voting <sup>83</sup>	119, 359
4.9.2	Referenda and other instruments of direct democracy <sup>84</sup>	240, 361, 378
4.9.2.1	Admissibility <sup>85</sup>	
4.9.2.2	Effects	

<sup>80</sup> See also 3.6.

<sup>81</sup> And other units of local self-government.

<sup>82</sup> See also keywords 5.3.41 and 5.2.1.4.

<sup>83</sup> Organs of control and supervision.

<sup>84</sup> Including other consultations.

<sup>85</sup> For questions of jurisdiction, see keyword 1.3.4.6.

4.9.3	Electoral system <sup>86</sup>	
4.9.3.1	Method of voting <sup>87</sup>	
4.9.4	Constituencies.....	62
4.9.5	Eligibility <sup>88</sup> .....	26, 173
4.9.6	Representation of minorities .....	273
4.9.7	Preliminary procedures	
4.9.7.1	Electoral rolls	
4.9.7.2	Registration of parties and candidates <sup>89</sup> .....	120, 177, 273
4.9.7.3	Ballot papers <sup>90</sup>	
4.9.8	Electoral campaign and campaign material <sup>91</sup> .....	287
4.9.8.1	Campaign financing	
4.9.8.2	Campaign expenses .....	392
4.9.9	Voting procedures	
4.9.9.1	Polling stations	
4.9.9.2	Polling booths	
4.9.9.3	Voting <sup>92</sup>	
4.9.9.4	Identity checks on voters	
4.9.9.5	Record of persons having voted <sup>93</sup>	
4.9.9.6	Casting of votes <sup>94</sup>	
4.9.10	Minimum participation rate required	
4.9.11	Determination of votes	
4.9.11.1	Counting of votes	
4.9.11.2	Electoral reports	
4.9.12	Proclamation of results	
4.9.13	Post-electoral procedures	
4.10	<b>Public finances</b> <sup>95</sup> .....	80, 334, 345
4.10.1	Principles.....	60, 63, 316
4.10.2	Budget.....	30, 63, 313, 316
4.10.3	Accounts	
4.10.4	Currency	
4.10.5	Central bank.....	161, 334
4.10.6	Auditing bodies <sup>96</sup>	
4.10.7	Taxation .....	265
4.10.7.1	Principles .....	77, 345
4.10.8	Public assets <sup>97</sup>	
4.10.8.1	Privatisation .....	104, 118, 383
4.11	<b>Armed forces, police forces and secret services</b>	
4.11.1	Armed forces.....	184, 252, 329
4.11.2	Police forces	
4.11.3	Secret services.....	341
4.12	<b>Ombudsman</b> <sup>98</sup>	
4.12.1	Appointment	
4.12.2	Guarantees of independence	

86

Proportional, majority, preferential, single-member constituencies, etc.

87

For example, *Panachage*, voting for whole list or part of list, blank votes.

88

For aspects related to fundamental rights, see 5.3.41.2.

89

For the creation of political parties, see 4.5.10.1.

90

For example, names of parties, order of presentation, logo, emblem or question in a referendum.

91

Tracts, letters, press, radio and television, posters, nominations, etc.

92

Impartiality of electoral authorities, incidents, disturbances.

93

For example, signatures on electoral rolls, stamps, crossing out of names on list.

94

For example, in person, proxy vote, postal vote, electronic vote.

95

This keyword covers property of the central state, regions and municipalities and may be applied together with chapter 4.8.

96

For example, Auditor-General.

97

Includes ownership in undertakings by the state, regions or municipalities.

98

Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

4.12.2.1	Term of office	
4.12.2.2	Incompatibilities	
4.12.2.3	Immunities	
4.12.2.4	Financial independence	
4.12.3	Powers	
4.12.4	Organisation	
4.12.5	Relations with the Head of State	
4.12.6	Relations with the legislature	
4.12.7	Relations with the executive	
4.12.8	Relations with auditing bodies <sup>99</sup>	
4.12.9	Relations with judicial bodies	
4.12.10	Relations with federal or regional authorities .....	<b>370</b>
4.13	<b>Independent administrative authorities<sup>100</sup></b>	
4.14	<b>Activities and duties assigned to the State by the Constitution<sup>101</sup></b> .....	56, 130
4.15	<b>Exercise of public functions by private bodies</b> .....	101, 130
4.16	<b>International relations</b> .....	32, 169, 202
4.16.1	Transfer of powers to international institutions.....	95
4.17	<b>European Union</b>	
4.17.1	Institutional structure .....	124
4.17.1.1	European Parliament .....	126, <b>408, 409</b>
4.17.1.2	Council	
4.17.1.3	Commission	
4.17.1.4	Court of Justice of the European Communities <sup>102</sup>	
4.17.2	Distribution of powers between Community and member states	
4.17.3	Distribution of powers between institutions of the Community	
4.17.4	Legislative procedure	
4.18	<b>State of emergency and emergency powers<sup>103</sup></b>	
5	<b><u>Fundamental Rights<sup>104</sup></u></b>	
5.1	<b>General questions</b>	
5.1.1	Entitlement to rights .....	143
5.1.1.1	Nationals	
5.1.1.1.1	Nationals living abroad .....	96, <b>361, 390</b>
5.1.1.2	Citizens of the European Union and non-citizens with similar status.....	198, <b>406, 415</b>
5.1.1.3	Foreigners.....	199, <b>263, 266, 314, 361</b>
5.1.1.3.1	Refugees and applicants for refugee status.....	82
5.1.1.4	Natural persons.....	<b>284, 408</b>
5.1.1.4.1	Minors <sup>105</sup> .....	<b>395</b>
5.1.1.4.2	Incapacitated	
5.1.1.4.3	Detainees .....	85, 92
5.1.1.4.4	Military personnel .....	<b>252, 341</b>
5.1.1.5	Legal persons .....	<b>392</b>
5.1.1.5.1	Private law .....	78

<sup>99</sup> For example, Court of Auditors.

<sup>100</sup> The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

<sup>101</sup> *Staatszielbestimmungen*.

<sup>102</sup> Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

<sup>103</sup> Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.4.1.

<sup>104</sup> Positive and negative aspects.

<sup>105</sup> For rights of the child, see 5.3.44.

	5.1.1.5.2	Public law .....	56
5.1.2		Horizontal effects .....	72
5.1.3		Positive obligation of the state .....	32, 69, 130, 207, 209, <b>290, 320, 345</b>
5.1.4		Limits and restrictions <sup>106</sup> .....	92, <b>239, 249, 251, 255, 345, 383, 387, 402, 412</b>
	5.1.4.1	Non-derogable rights .....	
	5.1.4.2	General/special clause of limitation .....	151
	5.1.4.3	Subsequent review of limitation .....	
5.1.5		Emergency situations <sup>107</sup> .....	
5.2	<b>Equality</b> .....		16, 17, 18, 21, 79, <b>255, 261, 291, 320, 335, 336, 345, 405</b>
5.2.1		Scope of application .....	5, 103, 114
	5.2.1.1	Public burdens <sup>108</sup> .....	18, <b>289, 307, 345</b>
	5.2.1.2	Employment .....	106
	5.2.1.2.1	In private law .....	108, 109, 110, 111
	5.2.1.2.2	In public law .....	9, 59, 194, <b>297</b>
	5.2.1.3	Social security .....	11, 21, 59, <b>295, 313, 314, 341, 345, 376</b>
	5.2.1.4	Elections <sup>109</sup> .....	96, 126, <b>359, 416</b>
5.2.2		Criteria of distinction .....	38, 43, 111, <b>252, 253, 367</b>
	5.2.2.1	Gender .....	59, 209, <b>297, 345, 399</b>
	5.2.2.2	Race .....	
	5.2.2.3	Ethnic origin .....	<b>294, 416</b>
	5.2.2.4	Citizenship or nationality <sup>110</sup> .....	21, 196, <b>290, 314, 406, 415</b>
	5.2.2.5	Social origin .....	
	5.2.2.6	Religion .....	130
	5.2.2.7	Age .....	59, 106, <b>303, 345, 376</b>
	5.2.2.8	Physical or mental disability .....	
	5.2.2.9	Political opinions or affiliation .....	<b>256</b>
	5.2.2.10	Language .....	<b>374</b>
	5.2.2.11	Sexual orientation .....	79, 139, <b>295, 307</b>
	5.2.2.12	Civil status <sup>111</sup> .....	109, 110, <b>295, 307</b>
	5.2.2.13	Differentiation <i>ratione temporis</i> .....	108, <b>341</b>
5.2.3		Affirmative action .....	
5.3	<b>Civil and political rights</b> .....		
5.3.1		Right to dignity .....	23, 26, 66, 67, 69, 85, 86, <b>284, 354, 379</b>
5.3.2		Right to life .....	98, 114, 137, 151, 207, 209, <b>263, 292, 390, 399</b>
5.3.3		Prohibition of torture and inhuman and degrading treatment .....	32, 66, <b>395</b>
5.3.4		Right to physical and psychological integrity .....	23, 26, 82, 209, <b>268, 333, 399</b>
	5.3.4.1	Scientific and medical treatment and experiments .....	
5.3.5		Individual liberty <sup>112</sup> .....	<b>397, 399</b>
	5.3.5.1	Deprivation of liberty .....	32, 66, <b>278, 395</b>
	5.3.5.1.1	Arrest <sup>113</sup> .....	7, <b>247, 268, 320, 330, 387</b>
	5.3.5.1.2	Non-penal measures .....	<b>368</b>
	5.3.5.1.3	Detention pending trial .....	7, 85, <b>278, 349</b>
	5.3.5.1.4	Conditional release .....	
	5.3.5.2	Prohibition of forced or compulsory labour .....	

<sup>106</sup> The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.

<sup>107</sup> Includes questions of the suspension of rights. See also 4.18.

<sup>108</sup> Taxes and other duties towards the state.

<sup>109</sup> Universal and equal suffrage.

<sup>110</sup> According to the European Convention on Nationality of 1997, ETS no. 166, "nationality" means the legal bond between a person and a state and does not indicate the person's ethnic origin" (Article 2) and "... with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous" (paragraph 23, Explanatory Memorandum).

<sup>111</sup> For example, discrimination between married and single persons.

<sup>112</sup> This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

<sup>113</sup> Detention by police.

5.3.6	Freedom of movement <sup>114</sup> .....	198, 294, 359, 406
5.3.7	Right to emigrate	
5.3.8	Right to citizenship or nationality.....	318, 361, 397
5.3.9	Right of residence <sup>115</sup> .....	199, 361
5.3.10	Rights of domicile and establishment.....	294
5.3.11	Right of asylum	
5.3.12	Security of the person .....	32, 249, 397
5.3.13	Procedural safeguards, rights of the defence and fair trial.....	6, 7, 26, 46, 151, 172, 173
	.....	181, 279, 389
5.3.13.1	Scope	
	5.3.13.1.1 Constitutional proceedings	
	5.3.13.1.2 Civil proceedings .....	150, 271, 327, 333
	5.3.13.1.3 Criminal proceedings.....	14, 27, 46, 85, 98, 115, 143, 278, 281, 330
	5.3.13.1.4 Litigious administrative proceedings.....	25, 113, 242, 252, 253
	5.3.13.1.5 Non-litigious administrative proceedings.....	56
5.3.13.2	Effective remedy .....	56, 60, 154, 155, 194, 242, 268, 399
5.3.13.3	Access to courts <sup>116</sup> .....	14, 60, 86, 122, 143, 242, 248, 252, 253, 255
	.....	286, 303, 380, 408, 412
	5.3.13.3.1 <i>Habeas corpus</i> .....	278
5.3.13.4	Double degree of jurisdiction <sup>117</sup> .....	16, 242, 264
5.3.13.5	Suspensive effect of appeal.....	28, 46
5.3.13.6	Right to a hearing.....	16, 49, 133, 202, 412
5.3.13.7	Right to participate in the administration of justice <sup>118</sup> .....	133
5.3.13.8	Right of access to the file.....	23, 402
5.3.13.9	Public hearings	
5.3.13.10	Trial by jury .....	123, 151
5.3.13.11	Public judgments.....	54
5.3.13.12	Right to be informed about the decision .....	164, 181
5.3.13.13	Trial/decision within reasonable time .....	260
5.3.13.14	Independence .....	197, 316, 332, 412
5.3.13.15	Impartiality <sup>119</sup> .....	197, 412
5.3.13.16	Prohibition of <i>reformatio in peius</i> .....	411
5.3.13.17	Rules of evidence .....	279, 327, 333, 362
5.3.13.18	Reasoning.....	6, 118, 123, 155, 176
5.3.13.19	Equality of arms .....	49, 133, 159, 362
5.3.13.20	Adversarial principle.....	133, 171
5.3.13.21	Languages .....	374
5.3.13.22	Presumption of innocence .....	28, 147, 167, 279, 356, 379
5.3.13.23	Right to remain silent	
	5.3.13.23.1 Right not to incriminate oneself .....	51
	5.3.13.23.2 Right not to testify against spouse/close family	
5.3.13.24	Right to be informed about the reasons of detention	
5.3.13.25	Right to be informed about the charges.....	23, 167, 330, 412
5.3.13.26	Right to have adequate time and facilities for the preparation of the case	
5.3.13.27	Right to counsel	
	5.3.13.27.1 Right to paid legal assistance.....	351
5.3.13.28	Right to examine witnesses	
5.3.14	<i>Ne bis in idem</i> .....	243, 245, 257
5.3.15	Rights of victims of crime .....	115, 399
5.3.16	Principle of the application of the more lenient law	
5.3.17	Right to compensation for damage caused by the State .....	268, 361, 402

<sup>114</sup> Including questions related to the granting of passports or other travel documents.

<sup>115</sup> May include questions of expulsion and extradition.

<sup>116</sup> Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

<sup>117</sup> This keyword covers the right of appeal to a court.

<sup>118</sup> Including the right to be present at hearing.

<sup>119</sup> Including challenging of a judge.



5.3.18	Freedom of conscience <sup>120</sup> .....	130, <b>256</b>
5.3.19	Freedom of opinion .....	67, 173, <b>302, 353</b>
5.3.20	Freedom of worship .....	9, 94, 130, <b>338</b>
5.3.21	Freedom of expression <sup>121</sup> .....	67, 72, 78, 86, 92, 101, 159, <b>267, 287, 291, 302, 338, 353, 392, 394</b>
5.3.22	Freedom of the written press .....	159, <b>267</b>
5.3.23	Rights in respect of the audiovisual media and other means of mass communication.....	86
5.3.24	Right to information .....	54
5.3.25	Right to administrative transparency	
	5.3.25.1 Right of access to administrative documents	
5.3.26	National service <sup>122</sup> .....	
5.3.27	Freedom of association.....	35, <b>291</b>
5.3.28	Freedom of assembly.....	51, 94
5.3.29	Right to participate in public affairs .....	179
	5.3.29.1 Right to participate in political activity .....	<b>359, 416</b>
5.3.30	Right of resistance	
5.3.31	Right to respect for one's honour and reputation .....	72, 86, 157, 159, 179, <b>302</b>
5.3.32	Right to private life .....	86, 120, 147, 163, <b>257, 281, 333</b>
	5.3.32.1 Protection of personal data .....	17, <b>415</b>
5.3.33	Right to family life <sup>123</sup> .....	6, 176, 191, <b>306</b>
	5.3.33.1 Descent	
	5.3.33.2 Succession	
5.3.34	Right to marriage.....	79
5.3.35	Inviolability of the home.....	113, <b>257, 281, 397</b>
5.3.36	Inviolability of communications	
	5.3.36.1 Correspondence	
	5.3.36.2 Telephonic communications .....	74, 145
	5.3.36.3 Electronic communications .....	145
5.3.37	Right of petition .....	157
5.3.38	Non-retrospective effect of law.....	<b>356</b>
	5.3.38.1 Criminal law	
	5.3.38.2 Civil law	
	5.3.38.3 Social law	
	5.3.38.4 Taxation law.....	57, <b>339</b>
5.3.39	Right to property <sup>124</sup> .....	18, <b>249, 251, 265, 282, 339, 383, 402</b>
	5.3.39.1 Expropriation	
	5.3.39.2 Nationalisation .....	<b>275</b>
	5.3.39.3 Other limitations .....	34, 43, 93, 202, <b>257, 341, 345</b>
	5.3.39.4 Privatisation .....	43, 118
5.3.40	Linguistic freedom.....	<b>374</b>
5.3.41	Electoral rights .....	173
	5.3.41.1 Right to vote.....	62, 96, <b>255, 284, 287</b>
	5.3.41.2 Right to stand for election .....	26, 62, 177, <b>255, 287, 416</b>
	5.3.41.3 Freedom of voting.....	126
	5.3.41.4 Secret ballot	
	5.3.41.5 Direct / indirect ballot .....	126
	5.3.41.6 Frequency and regularity of elections	
5.3.42	Rights in respect of taxation.....	57, 77, 113, <b>265, 307, 339, 345</b>
5.3.43	Right to self fulfilment.....	79, 137
5.3.44	Rights of the child.....	16, 23, 130, <b>292, 306, 399</b>
5.3.45	Protection of minorities and persons belonging to minorities.....	130

<sup>120</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>121</sup> This keyword also includes the right to freely communicate information.

<sup>122</sup> Militia, conscientious objection, etc.

<sup>123</sup> Aspects of the use of names are included either here or under "Right to private life".

<sup>124</sup> Including compensation issues.

5.4	<b>Economic, social and cultural rights</b>	
5.4.1	Freedom to teach	
5.4.2	Right to education .....	116
5.4.3	Right to work .....	6, 11, 59, 99, 141, 182
5.4.4	Freedom to choose one's profession <sup>125</sup> .....	99, <b>299, 345, 402</b>
5.4.5	Freedom to work for remuneration	
5.4.6	Commercial and industrial freedom .....	17, 34, 38, 78, <b>251, 287, 289, 320, 373</b>
5.4.7	Consumer protection .....	78, 104
5.4.8	Freedom of contract .....	<b>303</b>
5.4.9	Right of access to the public service	
5.4.10	Right to strike	
5.4.11	Freedom of trade unions <sup>126</sup> .....	124
5.4.12	Right to intellectual property .....	<b>380</b>
5.4.13	Right to housing	
5.4.14	Right to social security .....	21, 153, <b>261, 314, 322, 324, 341, 345</b>
5.4.15	Right to unemployment benefits .....	11, 135
5.4.16	Right to a pension .....	35, 153, <b>290, 322, 324, 341, 345</b>
5.4.17	Right to just and decent working conditions	
5.4.18	Right to a sufficient standard of living .....	69, <b>341</b>
5.4.19	Right to health .....	<b>289, 292, 320</b>
5.4.20	Right to culture	
5.4.21	Scientific freedom .....	<b>239</b>
5.4.22	Artistic freedom	
5.5	<b>Collective rights</b>	
5.5.1	Right to the environment .....	13
5.5.2	Right to development	
5.5.3	Right to peace	
5.5.4	Right to self-determination	
5.5.5	Rights of aboriginal peoples, ancestral rights	

<sup>125</sup>

This keyword also covers "Freedom of work".

<sup>126</sup>

Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

## **Keywords of the alphabetical index \***

\* The précis presented in this Bulletin are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

Page numbers of the alphabetical index refer to the page showing the identification of the decision rather than the keyword itself.

Pages	Pages
Abortion, information session, prior, obligation ..... 137	Art, owner, rights, limitation..... <b>380</b>
Abortion, number, containment, measures ..... 137	Assets, declaration..... <b>335, 336</b>
Abortion, punishment, exception..... 114	Attachment..... <b>354</b>
Abortion, punishment, exclusion, conditions..... 137	Authority, administrative, power, discretionary ..... 118
Abortion, responsibility..... 137	Authority, notion ..... 117
Absconding, danger ..... <b>320</b>	Authority, territorial, autonomous, status, powers ..... <b>370</b>
Acquittal, effects..... <b>278</b>	Autonomy, statute, procedure and reform correct ..... <b>370</b>
Act, <i>ultra vires</i> , European Union, Federal Constitutional Court review ..... <b>303</b>	Benefit, right, abolition, restriction..... 11
Action for medical damages..... <b>292</b>	Bill, passing by both chambers of Parliament..... <b>364</b>
Administrative act, nature ..... 116	Birth, injury ..... <b>292</b>
Administrative act, reasoning, reference to case-law, obligation ..... 118	Budget..... <b>322</b>
Administrative courts, jurisdiction..... <b>323</b>	Budget, law, amendment ..... 30
Administrative penalty ..... <b>257</b>	Burden of proof ..... 147
Administrative proceedings ..... 25	Cabinet of Ministers, powers..... 184
Adoption, full, of an adult ..... 110	Case-law, reversal ..... 171
Advertising, ban ..... 78	Cassation appeal, imperfection, correction, right..... <b>242</b>
Advertising, outdoor, prohibition ..... <b>287</b>	Cassation, admissibility, conditions ..... <b>242</b>
Age, limit ..... 99	Cease and desist order, civil-law ..... 72
Animal cruelty, depictions ..... <b>394</b>	Censorship..... 101
Annexation ..... <b>318</b>	Central bank, hearing of the governor ..... <b>334</b>
Anonymity, right ..... 86	Challenging, judge ..... 46
Anti-abortionist, protests, civil-court order to cease and desist..... <b>302</b>	Charge, right to be informed about ..... 167
Appeal, interest, linked to scope of legislation ..... 17	Child born out of wedlock..... <b>306</b>
Appeal, interest, several appellants ..... 17	Child, best interests ..... <b>306</b>
Appeal, intervening party ..... 17	Child, capable of understanding, equal access to the courts, right to be heard ..... 16
Appeal, procedure..... <b>248</b>	Child, right to be heard, double degree of jurisdiction..... 16
Appeal, right..... <b>28, 154, 389</b>	Church, property, restitution..... <b>282</b>
Appeal, right, other legal remedies ..... 157	Citizenship, continuity, principle..... <b>318</b>
Applicant, <i>locus standi</i> ..... <b>286</b>	Citizenship, deprivation..... <b>318</b>
Arm, munition, use, control ..... <b>329</b>	Citizenship, dual..... <b>318</b>
Arm, possession, unlawful ..... <b>329</b>	Citizenship, privileges and immunities ..... <b>397</b>
Arm, right to keep and bear ..... <b>397</b>	Civil liability ..... 29, 103
Armed Force, use, abroad ..... <b>390</b>	Civil partnership, registered ..... <b>295, 307</b>
Armed forces, discipline, judicial review ..... <b>252</b>	Civil proceedings, against "X", procedure, absence ..... 86
Arms, right to bear, limitation ..... <b>329</b>	Civil servant ..... <b>322</b>
Arrest and detention, safeguard..... 7	Civil servant, commitment..... 141
Arrest for vagrancy, not an offence..... <b>387</b>	Civil servant, dignity, rights ..... <b>379</b>
Arrest warrant, foreign ..... <b>320</b>	Civil servant, employment, contract..... 141
Arrest, legal grounds..... <b>368</b>	Civil servant, job security ..... 141
Arrest, safeguards..... <b>368</b>	
Arrest, warrant, offence, qualification, requirement..... <b>330</b>	

Civil servant, recruitment.....	99	Cooperation, good faith, institutions, member States .....	193
Civil servant, rights and obligations .....	147	Council of Ministers, meetings, confidentiality.....	121
Civil servant, status .....	117	Council of State, powers, legislative assembly .....	<b>253</b>
Civil service, ethics.....	<b>379</b>	Court fee, non-payment.....	181
Civil service, multiple posts, incompatibility.....	147	Court of Justice of the European Union, submission procedure, preliminary ruling.....	<b>303</b>
Code, civil procedure.....	<b>389</b>	Court, competence, exclusive .....	119
Collective interest .....	117	Court, independence .....	<b>324</b>
Commercial freedom, restrictions.....	<b>251</b>	Court, interim order .....	169
Communist regime .....	<b>341</b>	Craft industry, organisation, property, protection.....	38
Community law, act implementing resolutions of the United Nations Security Council.....	<b>202</b>	Crime prevention, public interest, proportionality.....	191
Community law, application <i>ex officio</i> , by national courts .....	<b>411</b>	Crime, fight, justification for register of foreigners .....	<b>415</b>
Community law, primacy .....	<b>411</b>	Crime, qualification.....	<b>330</b>
Community law, principles, equal treatment.....	<b>406</b>	Criminal charge .....	<b>260</b>
Community, autonomous .....	<b>370</b>	Criminal law.....	27
Community, religious.....	94	Criminal matter, legality, delegation of power to the King .....	20
Company, board, members.....	182	Criminal matter, legality, European regulation .....	20
Company, organisational power.....	182	Criminal matter, legality, principle .....	20
Company, pharmaceutical, right.....	34	Criminal procedure .....	6
Compatible interpretation .....	16	Criminal procedure, guarantees .....	14, 115
Compensation, damage, entitlement.....	<b>361</b>	Criminal procedure, preparatory phase, guarantee .....	14, <b>330</b>
Compensation, discrimination, non European Union citizen.....	196	Criminal proceedings, guarantee .....	<b>281</b>
Competence <i>ratione temporis</i> .....	<b>207</b>	Damage incurred relying on legitimate expectations .....	<b>303</b>
Competence, legislative .....	<b>328</b>	Damage, compensation, loss, non-economic .....	103
Competition .....	17	Damage, irreparable.....	<b>333</b>
Competition, agreements, fine, amount .....	<b>405</b>	Damages, quantum .....	<b>268</b>
Confiscation.....	147	Data, personal, treatment.....	155
Constituency.....	62	Data, retention.....	74
Constitution and treaty, similar provisions.....	18	Date, protection, discrimination of foreigners .....	<b>415</b>
Constitution, amendment .....	<b>240, 381</b>	Death penalty .....	98
Constitution, amendment, validity .....	<b>329, 385</b>	Debate, political.....	<b>287</b>
Constitution, amendments, proposal, constitutional review .....	<b>385</b>	Debt, imprisonment, prohibition.....	<b>368</b>
Constitution, interpretation .....	47	Deceased .....	163
Constitutional Council, member, assets, declaration, refusal.....	<b>335</b>	Decency, evolving standards .....	<b>395</b>
Constitutional Council, member, loss of office .....	<b>335</b>	Decision, judicial.....	150
Constitutional Court.....	119	Decision, judicial, non-execution .....	165
Constitutional Court, appeal, limits.....	<b>367</b>	Declaration of unconstitutionality.....	<b>367</b>
Constitutional Court, decision, application .....	<b>271</b>	Decree, legislative, review, constitutional.....	80
Constitutional Court, decision, binding force .....	<b>271</b>	Defamation, against public official.....	157
Constitutional Court, decision, execution .....	<b>271</b>	Defamation, through media .....	159
Constitutional Court, decision, execution, method .....	<b>275</b>	Defence, right.....	25, <b>279</b>
Constitutional Court, interpretation, binding effect.....	<b>271</b>	Descent, action challenging acknowledgement .....	108
Constitutional Court, jurisprudence .....	<b>275</b>	Descent, action disclaiming.....	108
Constitutional Court, summary proceedings .....	21	Descent, legitimate.....	108
Constitutional law, quality.....	42	Descent, natural .....	108
Constitutional protection, application.....	<b>271</b>	Descent, period within which action must be brought .....	108
Constitutional provision .....	<b>381</b>	Detainee, rights .....	85
Constitutional review .....	<b>311</b>	Detention for non-payment, validity.....	<b>368</b>
Constitutional traditions, common to the member states.....	<b>405</b>	Detention pending trial, hearing, accused, presence.....	85
Constraint measure, public security .....	143	Detention, humane .....	66
Contract, employment, cessation .....	<b>345</b>	Detention, lawfulness .....	<b>330, 387</b>
Convicted person .....	<b>248</b>	Development planning, powers.....	<b>366</b>
Convicted person, amnesty, right.....	167		
Convicted person, pardon, right to apply.....	167		

Difficulties, crisis, financial .....	<b>316</b>	European Union, freedom of movement of persons, limitation, justification .....	198
Diplomatic representatives.....	<b>318</b>	European Union, Parliament, member immunity ...	<b>408</b>
Directive, transposition.....	<b>289</b>	European Union, Parliament, member, immunity ..	<b>409</b>
Disability.....	<b>292</b>	European Union, regulation, legal basis .....	202
Disciplinary proceedings .....	<b>243, 245</b>	Eviction .....	<b>294</b>
Discrimination .....	<b>261, 290, 313, 345, 416</b>	Evidence, accounting, expertise .....	<b>327</b>
Disproportionate means.....	<b>368</b>	Evidence, admissibility.....	<b>333</b>
DNA, analysis .....	23	Evidence, new, consideration .....	<b>362</b>
DNA, testing, data, access.....	<b>333</b>	Examination, competitive .....	99
Due process.....	<b>397</b>	Executive, powers to initiate legislation .....	<b>328</b>
Education, public.....	116	Expectation, legitimate.....	103
Education, public, religion, encouragement by the State .....	130	Expert, opinion.....	<b>333, 362</b>
Education, student, termination of studies by University, legal nature.....	116	Expulsion .....	176
Effect of judgments, unconstitutionality, scope .....	<b>255</b>	Extradition .....	6, 172
Election, campaign, financing, by legal person, prohibition .....	<b>392</b>	Extradition, criminal conduct, respect for human rights .....	<b>263</b>
Election, campaign, restriction .....	<b>287</b>	Extradition, effect on family life .....	191
Election, candidacy, restriction .....	26, 177	Extradition, legality of the request.....	<b>266</b>
Election, candidate list, minimum signatures .....	<b>273</b>	Extradition, preconditions.....	66
Election, candidate, condition .....	<b>416</b>	Extradition, proceedings .....	66
Election, candidate, registration procedure.....	<b>273</b>	Extra-territorial effect.....	172
Election, citizen, residing abroad .....	<b>359</b>	Family allowance, child, EU citizen.....	21
Election, date, parliamentary decision .....	<b>385</b>	Family allowance, conditions, lawful residence .....	21
Election, disqualification.....	177	Family association .....	<b>291</b>
Election, electoral coalition .....	173	Family life, extradition, interference .....	191
Election, electoral code.....	<b>273</b>	Father, child born out of wedlock, parental custody.....	<b>306</b>
Election, electoral commission.....	<b>359</b>	Federal State, implied powers .....	<b>257</b>
Election, European Parliament .....	126	Financial control.....	<b>249</b>
Election, ineligibility.....	26, 96, 177, <b>416</b>	Fine, disciplinary, court, review.....	51
Election, list of candidates .....	<b>273</b>	Firearm.....	27
Election, local, candidate .....	<b>273</b>	Firearm, right to keep and bear.....	<b>397</b>
Election, municipality .....	<b>273</b>	Flat, privatisation.....	43
Election, preparatory procedure.....	<b>273</b>	Flat, purchase, sale.....	43
Election, sham .....	26	Foreign relations, constitutional review.....	32
Election, universal suffrage .....	96	Foreign relations, execution power.....	32
Election, voting.....	126	Foreigner, register of foreigners, justification.....	<b>415</b>
Electoral commission, members .....	<b>359</b>	Free movement, persons, national rules, conflicts of laws, family name, determination.....	<b>406</b>
Electricity, privatisation .....	118	Freedom of association, scope .....	35
Employment contract, fixed term .....	<b>303</b>	Freedom of contract.....	<b>251</b>
Employment, public-sector.....	141	Freedom of enterprise.....	<b>251, 289</b>
Enactment.....	<b>311</b>	Freedom of expression, collective .....	92
Energy sector.....	104	Freedom of expression, legal person.....	<b>392</b>
Energy, prices, regulation .....	104	Freedom, deprivation .....	<b>387</b>
Enterprise, freedom .....	<b>287</b>	Freedom, deprivation, measure .....	<b>247</b>
Entrepreneur, market, equal position.....	34	Fuels, biofuels.....	<b>256</b>
Entrepreneur, status, equal.....	38	Fundamental right, communication, control exercised by the Federal Constitutional Court.....	67
Environment, protection, powers, distribution .....	13	Fundamental right, national detained abroad, violation by national authorities.....	32
Equality, comparability .....	18	Fundamental right, protection, administrative proceedings .....	23
Equality, comparison.....	16	Gambling, internet.....	<b>289</b>
Equality, European citizens.....	21	Gender, difference, biological .....	<b>345</b>
European Council .....	124	General Framework Agreement (Dayton).....	<b>416</b>
European Union .....	<b>310</b>	Good administration, principle .....	141
European Union act, <i>ultra vires</i> .....	<b>303</b>	Government, action, review of constitutionality.....	<b>323</b>
European Union citizen, marriage, non EU citizen, right to residence .....	199	Government, taxation, lease .....	<b>265</b>
European Union citizenship, freedom of movement of persons .....	199	Handgun, right to keep and bear .....	<b>397</b>
European Union, citizenship .....	196		
European Union, directive, direct effect.....	194		

Hatred, incitement against segments of the population, judgment, criminal law .....	67	Judge, status .....	<b>324</b>
Head of State .....	<b>270</b>	Judgment, execution, law .....	150
Hearing, right, obligation to cover all arguments ....	133	Judgment, final .....	164
Hearing, right, scope .....	133	Judgment, final, deprivation .....	181
Home, concept .....	<b>257</b>	Judgment, publication .....	54
Home, inviolability .....	<b>257, 281</b>	Judicial independence .....	<b>54, 332</b>
Home, unoccupied residential property .....	<b>257</b>	Judicial restraint .....	169
Homosexuality, couple, marriage .....	139	Judicial review .....	<b>381</b>
Homosexuality, couple, same-sex .....	79	Judicial review, minimal intrusion .....	169
House, search .....	<b>281</b>	Judicial review, standards .....	82
Housing, procedure, privatisation .....	<b>275</b>	Judiciary, independence .....	<b>316</b>
Housing, right .....	<b>271</b>	Jurisdiction, territorial .....	<b>390</b>
Human rights treaties, states .....	264	Jury trial .....	26
Immigration, procedure .....	185	Jury, reasoning, fair trial .....	123
Immigration, rule .....	185	Land, agricultural, lease .....	154
Immunity, Parliament, member, defence .....	<b>409</b>	Language, official, used by the state authorities .....	91
Immunity, Parliament, member, lifting, right to appeal .....	<b>408</b>	Language, procedural document .....	<b>374</b>
Import, duty .....	169	Law, application, lacuna, unconstitutionality .....	<b>253</b>
Imprisonment .....	92	Law, entry into force .....	81
Imprisonment, electoral rights, suspension, transitional provision .....	<b>255</b>	Law, inapplicability, retroactive, compensation .....	<b>303</b>
Imprisonment, for debt, principle .....	<b>368</b>	Law, normativeness .....	<b>289</b>
Income, minimum, coverage, benefits, claim, ascertainment .....	69	Law, organic, quality .....	42
Income, minimum, in line with human dignity, fundamental right to guarantee .....	69	Law, pre-constitutional, status .....	<b>367</b>
Independence, state .....	<b>318</b>	Law, quality .....	35
Individual petition .....	171	Law, unconstitutionality, declaration, competence .....	119
Information, classified, protection .....	<b>279</b>	Lawyer .....	23, 25
Information, restriction .....	121, 122	Leave, maternity, remuneration .....	<b>261</b>
Information, right to seek, obtain and disseminate .....	<b>353</b>	Legal aid .....	<b>351</b>
Injunction, preliminary, protection, effective .....	49	Legal aid, equal access .....	<b>351</b>
Insurance, compulsory .....	103	Legal aid, free, right .....	<b>351</b>
Integrity, physical, interference .....	92	Legal capacity, restricted .....	<b>284</b>
Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará") .....	<b>399</b>	Legal capacity, state .....	<b>318</b>
Interception, invasion of privacy, personal data, secrecy of correspondence, storage .....	145	Legislation, judicial .....	86
Interest, compensation, calculation .....	<b>327</b>	Legislative lacuna .....	<b>253</b>
International agreement, direct applicability .....	95	Legislative omission .....	<b>282</b>
International law .....	<b>286</b>	Legislative omission, partial .....	11
International law, domestic law, relationship .....	169	Legislative procedure .....	<b>249, 251</b>
International obligation .....	169	Legislator, omission .....	<b>270</b>
Internet, anonymity, right .....	86	Legislature, appointment .....	<b>253</b>
Investigation, criminal, preliminary, time-limit, reasonable .....	<b>260</b>	Legislature, independence .....	<b>253</b>
Investigation, effective .....	<b>207</b>	Legitimate expectation, protection, principle .....	<b>282</b>
Investigation, effective, requirement .....	<b>399</b>	Liability, non contractual, lawful act, exclusion .....	<b>402</b>
Investigation, preliminary, criminal, mandatory .....	115	Liability, strict .....	29
Journalist, sources, disclosure .....	<b>267</b>	Life, social, cultural and political, participation .....	69
Judge .....	<b>325</b>	Limitation, effect on investigation .....	115
Judge, aptitude, requirement .....	<b>332</b>	Local government, finances .....	63
Judge, impartiality, objective .....	151, 197	Local self-government .....	107
Judge, independence .....	153, <b>324</b>	Local self-government, competence .....	40
Judge, qualifications .....	<b>332</b>	Local self-government, legislative power .....	40, <b>364</b>
Judge, retirement, age .....	<b>325</b>	Local self-government, property .....	34
Judge, salary, judicial independence .....	52	Local self-government, right .....	62, 63
		Lustration, delay .....	<b>356</b>
		Lustration, law, holders of public office .....	179
		Marginal control .....	18
		Marriage .....	79
		Marriage, as a symbolic institution .....	139
		Marriage, civil partnership, treatment, unequal .....	<b>307</b>
		Marriage, civil partnership, unequal treatment .....	<b>295</b>
		Marriage, couple, same-sex .....	139
		Media, data, telecommunications traffic, security .....	74

Media, data, telecommunications traffic, storage.....	74	Paternity, recognition .....	23
Media, data, telecommunications, retrieval and use .....	74	Paternity, right to know .....	23
Media, newspaper.....	<b>267</b>	Penalty.....	<b>338</b>
Media, telecommunication service, providers, storage, duty .....	74	Penalty, collective .....	<b>356</b>
Medical treatment .....	<b>376</b>	Penalty, enforcement .....	171
Medication, supply .....	34	Penalty, equal treatment, different situations.....	111
Military, disciplinary penalty, judicial review .....	<b>252</b>	Pension, crystallisation .....	<b>290</b>
Military, discipline.....	<b>252</b>	Pension, determination .....	<b>345</b>
Military, equipment, fund.....	184	Pension, disability .....	<b>314</b>
Military, personnel, staff regulations .....	<b>252</b>	Pension, fund.....	35
Minimum wage.....	<b>354</b>	Pension, judge .....	<b>316, 324</b>
Minor, life imprisonment, without parole .....	<b>395</b>	Pension, judges, amount .....	153
Monetary policy .....	<b>334</b>	Pension, occupational.....	59
Municipal council.....	107	Pension, principle of insurance .....	35
Name, registration, conflicting national rules .....	<b>406</b>	Pension, principle of solidarity .....	35
National Security Council.....	<b>279</b>	Pension, reduction .....	<b>322, 341</b>
NATO .....	<b>279</b>	Pension, retirement.....	59
Natural resources, exploitation .....	56	Pension, right.....	<b>345</b>
<i>Ne bis in idem</i> .....	<b>243, 245</b>	Pension, scheme .....	35
Notary, profession, exercise .....	106	Pension, social security .....	35
Nuclear power, operator, contribution.....	18	Pensioner, payment .....	<b>322</b>
Obligation to submit, preliminary ruling, Court of Justice of the European Union.....	<b>303</b>	Permit, residence.....	<b>314</b>
Occupation or profession, access, prerequisites, objective .....	<b>299</b>	Personal property, taxes.....	<b>265</b>
Occupation, consequences.....	<b>318</b>	Personality, right .....	163
Occupation, period.....	<b>318</b>	Personality, right, general .....	72
Occupational pensions.....	<b>295</b>	Pharmacy, ownership .....	34
Official.....	<b>322</b>	Pharmacy, transfer.....	34
Omission, legislative, partial .....	<b>248</b>	Place receiving members of the public, regulations .....	<b>320</b>
Opinion, expression, legal assessment .....	67	Place, public, use.....	<b>353</b>
Opinion, extreme right-wing .....	67	Planning regulations .....	<b>338</b>
Order, final, Court's power to vary .....	<b>367</b>	Police, investigation, continuing.....	23
Overbreadth, substantial, criteria .....	<b>394</b>	Police, officer, social guarantee .....	59
Ownership right, interference, taxation .....	18	Policy decision, reviewability.....	169
Ownership right, restriction .....	34, <b>287</b>	Policy, financial .....	169
Ownership, right, restriction .....	<b>275</b>	Policy, foreign .....	<b>286</b>
Pardon, legal nature.....	167	Political offence, pardon.....	167
Parentage, right to know .....	<b>333</b>	Political party, name.....	120
Parental custody, child born out of wedlock.....	<b>306</b>	Political party, programme .....	173
Parking.....	<b>294</b>	Political question, review.....	<b>318</b>
Parliament.....	<b>270</b>	Politician, reputation.....	120
Parliament, member, assets, declaration, refusal .....	<b>336</b>	Power, horizontal apportionment, independence.....	30
Parliament, member, attendance allowance.....	5	Precedent, judicial, digression, criteria .....	<b>392</b>
Parliament, member, immunity .....	188	Pregnancy, termination, protest.....	<b>302</b>
Parliament, member, interest-free loan.....	5	Preliminary ruling, effects.....	193
Parliament, member, loss of mandate .....	<b>336</b>	President of the Republic, activities .....	<b>323</b>
Parliament, member, mandate.....	5	President, immunity .....	188
Parliament, member, pension scheme .....	5	President, pardon.....	167
Parliament, member, principal monthly allowance, calculation .....	5	President, powers, limits, parliamentary regime ....	161
Parliament, member, representation allowance.....	5	President, status, dignity and efficiency.....	188
Parliament, member, secretariat.....	5	Pre-trial, procedure .....	<b>281</b>
Parliament, Standing Committee on Finance .....	<b>334</b>	Prison, sentence, execution.....	28
Parliamentary assembly, right of action .....	<b>253</b>	Prison, sentence, life, harsh.....	66
Passive smoking, protection .....	<b>373</b>	Prison, sentence, without any prospect of regaining freedom .....	66
Passport, issuing, powers .....	185	Prisoner.....	92
Paternity, investigation.....	23	Prisoner, treatment .....	26
		Privacy, data base .....	17
		Privacy, medical data.....	17
		Privatisation, equal treatment, employees.....	<b>297</b>
		Privatisation, procedure, state-owned housing.....	<b>383</b>

Procedural autonomy, national.....	<b>411</b>	Residence permit .....	176, <b>359</b>
Procedural document, official language, use .....	<b>374</b>	Residence, discrimination .....	<b>361</b>
Procedure, civil.....	150	Residence, EU citizen, spouse.....	199
Procedure, criminal .....	151	Residence, permanent, registration .....	<b>361</b>
Proceedings <i>in absentia</i> .....	172	Residence, registration.....	96
Proceedings, criminal .....	164	Resource, financial, adequate.....	<b>316</b>
Proceedings, fee .....	60	Respect for the dead .....	163
Property, private and municipal.....	43	Right of action .....	<b>286</b>
Property, private, right .....	<b>275</b>	Right of personality, general, encroachment.....	<b>302</b>
Property, protection .....	<b>275</b>	Right to a proper living .....	<b>354</b>
Property, public, use for advertising .....	<b>353</b>	Right to acceptable housing .....	<b>257</b>
Property, real.....	77	Right to appeal, constitutional states.....	<b>264</b>
Property, right to dispose of .....	184	Right to effective judicial protection.....	194
Property, seizure .....	<b>268</b>	Right to personal liberty.....	<b>247</b>
Property, socially owned, equal treatment .....	<b>271</b>	Right to private life, interference.....	23
Property, transfer.....	34	Right to property .....	<b>251</b>
Property, value, reduced .....	<b>275</b>	Right to return to civil service .....	<b>297</b>
Proportionality, burden of proof.....	82	Right to vote .....	<b>284</b>
Public establishment, restrictions .....	<b>373</b>	Right, constitutional, protection, form, choice.....	137
Public health, protection .....	34	Right, essence, guarantee .....	35
Public international law, minimum standards .....	66	Rights, protection, equal.....	209
Public order .....	<b>289, 294</b>	Salary, judge .....	<b>316</b>
Public policy reason .....	<b>339</b>	Sale between spouses, prohibition.....	109
Public prosecutor.....	<b>278</b>	Sanction, administrative .....	51
Public prosecutor, powers .....	<b>281</b>	Search warrant, validity .....	<b>267</b>
Public service .....	29	Search, strip search, incident to arrest.....	<b>268</b>
Punishment, community consensus, justification.....	<b>395</b>	Secret investigation .....	23
Punishment, cruel and unusual .....	<b>395</b>	Security, financial, judge .....	<b>316</b>
Punishment, penal, adequate.....	98	Sentence, proportionality.....	98
Punishment, terms .....	114	Sentencing, increase .....	27
Punishment, unbearable kind.....	66	Sickness insurance, benefit.....	<b>376</b>
Referendum, constitutional, right to request.....	<b>240</b>	Smoking room .....	<b>373</b>
Referendum, consultative, organisation, conditions .....	<b>378</b>	Smoking, area .....	<b>320</b>
Referendum, restriction .....	<b>361</b>	Smoking, ban .....	<b>320</b>
Refugee, expulsion.....	82	Social guarantee, judge.....	<b>316</b>
Region, legislative procedure .....	<b>364</b>	Social security .....	153
Region, power, political status.....	<b>370</b>	Social security, board.....	35
Register, land .....	93	Social security, right, contribution.....	35
Regulating authority .....	<b>289</b>	Solidarity, principle .....	<b>316</b>
Religion .....	<b>338</b>	<i>Stare decisis</i> , application, criteria.....	<b>392</b>
Religion, church and State, peaceful co-existence .....	94	<i>Stare decisis</i> , nature.....	<b>392</b>
Religion, religious activity, freedom .....	<b>282</b>	State employee .....	<b>322</b>
Religion, religious community.....	9	State power .....	<b>323</b>
Religion, religious worship, protection.....	94	State, continuity.....	<b>318</b>
Religion, state.....	9	Statute of limitation.....	164
Religious freedom, interference, practices .....	<b>256</b>	Student.....	<b>313</b>
Remand in custody.....	<b>278, 349</b>	Student, right, termination .....	116
Remedy, adequate, determined by the court .....	<b>268</b>	Subsidy, agriculture.....	<b>310</b>
Remedy, appropriate.....	32	Supreme Court, admissibility, decision, incompetence .....	<b>329</b>
Remedy, violation, constitutional right.....	<b>361</b>	Supreme Court, decision, binding nature .....	117, 118
Remuneration.....	<b>322</b>	Survivor's pension .....	<b>295</b>
Remuneration, equal .....	<b>261</b>	Suspect, fundamental rights.....	14
Remuneration, judge .....	<b>316</b>	Suspensive effect.....	<b>278</b>
Repatriation, request, refusal .....	32	Tax authority, powers .....	77, 113
<i>Res judicata</i> , review of administrative decision, obligation.....	193	Tax inspection, account review, duration .....	113
Rescue services, private companies.....	<b>299</b>	Tax inspection, duration, limit.....	113
Rescue services, system change.....	<b>299</b>	Tax law, amendments .....	57
		Tax law, inheritance tax, gift tax .....	<b>307</b>
		Tax, exemption, competence .....	<b>328</b>
		Tax, property .....	77



---

Taxation, principle of lawfulness .....	18
Taxation, tax on unoccupied residential properties .....	<b>257</b>
Tenancy, right .....	<b>271</b>
Term of office .....	<b>324</b>
Term of office, extension.....	<b>325</b>
Terrorism.....	151, 173
Terrorism, assets, freeze, procedure, guarantee .....	<b>412</b>
Terrorism, fight.....	<b>249</b>
Terrorism, fight, fundamental rights, protection, weighing.....	<b>412</b>
Terrorism, fight, means, choice.....	85
Terrorism, financing .....	202
Terrorism, restrictive measures .....	202
Terrorism, suspect, fair hearing .....	<b>412</b>
Time limit, element of right.....	113, <b>271</b>
Time limit, national procedural autonomy .....	193
Town planning, powers .....	<b>366</b>
Trade, regulation.....	169
Transport, passengers, public.....	29
Travellers .....	<b>294</b>
Treaty, European Communities .....	<b>311</b>
True facts, publication .....	72
Unemployment, benefit, application, deadline, failure to meet .....	<b>135</b>
Unemployment, benefit, equality.....	11
Unemployment, benefit, exclusion, proportionality .....	135
United Nations, Security Council, resolution, implementation by the EU.....	202
University, autonomy .....	116, <b>239</b>
<i>Vacatio legis</i> .....	126
Value, constitutional, objective.....	137
Venice Commission, Venice Forum.....	<b>368</b>
Violence, domestic.....	209
Violence, gender-based .....	<b>399</b>
Vote, prohibition .....	<b>255</b>
War veterans.....	<b>290</b>
Weapon, licence .....	155
Witness, hearing .....	<b>362</b>
Women, violence, against, prevention .....	<b>399</b>
World Trade Organisation.....	169
World Trade Organisation, agreements, effects in European Community, judicial review, exclusion .....	<b>402</b>
Young persons, protection .....	169

---





**Sales agents for publications of the Council of Europe**  
**Agents de vente des publications du Conseil de l'Europe**

**BELGIUM/BELGIQUE**

La Librairie Européenne  
The European Bookshop  
Rue de l'Orme, 1  
BE-1040 BRUXELLES  
Tel: 32 (0)2 231 0435  
Fax: 32 (0)2 735 0860  
E-mail: [order@libeurop.be](mailto:order@libeurop.be)  
<http://www.libeurop.be>

Jean De Lannoy / DL Services  
Avenue du Roi 202 Koningslaan  
BE-1190 BRUXELLES  
Tel: 32 (0) 2 538 4308  
Fax: 32 (0) 2 538 0841  
E-mail: [jean.de.lannoy@dl-servi.com](mailto:jean.de.lannoy@dl-servi.com)  
<http://www.jean-de-lannoy.be>

**BOSNIA AND HERZEGOVINA/  
BOSNIE-HERZÉGOVINE**

Robert's Plus d.o.o  
Marka Marulića 2/v  
BA-71000, SARAJEVO  
Tel/Fax: 387 33 640 818  
E-mail: [robertsplus@bih.net.ba](mailto:robertsplus@bih.net.ba)

**CANADA**

Renouf Publishing Co. Ltd.  
1-5369 Canotek Road  
CA-OTTAWA, Ontario, K1J 9J3  
Tel: 1 613 745 2665  
Fax: 1 613 745 7660  
Toll-Free Tel: (866) 767-6766  
E-mail: [order\\_dept@renoufbooks.com](mailto:order_dept@renoufbooks.com)  
<http://www.renoufbooks.com>

**CROATIA/CROATIE**

Robert's Plus d.o.o  
Marasovičeva 67  
HR-21000, SPLIT  
Tel: 385 21 315 800 ,801, 802, 803  
Fax: 385 21 315 804  
E-mail: [robertsplus@robertsplus.hr](mailto:robertsplus@robertsplus.hr)

**CZECH REPUBLIC/RÉPUBLIQUE  
TCHÈQUE**

Suweco CZ s.r.o  
Klecakova 347  
CZ – 18021 PRAHA 9  
Tél: 420 2 424 59 204  
Fax: 420 2 848 21 646  
E-mail: [import@suweco.cz](mailto:import@suweco.cz)  
<http://www.suweco.cz>

**DENMARK/DANEMARK**

GAD, Vimmelskaftet 32  
DK-1161 KØBENHAVN K  
Tel.: +45 77 66 60 00  
Fax: +45 77 66 60 01  
E-mail: [gad@gad.dk](mailto:gad@gad.dk)  
<http://www.gad.dk>

**FINLAND/FINLANDE**

Akateeminen Kirjakauppa  
Keskuskatu 1  
PO Box 128  
FI-00100 HELSINKI  
Tel.: 358 (0) 9 121 4430  
Fax: 358 (0) 9 121 4242  
E-mail : [akatilaus@akateeminen.com](mailto:akatilaus@akateeminen.com)  
<http://www.akateeminen.com>

**FRANCE**

La Documentation française  
(diffusion/distribution France entière)  
124, rue Henri Barbusse  
FR-93308 AUBERVILLIERS CEDEX  
Tel.: 33 (0)1 40 15 70 00  
Fax: 33 (0)1 40 15 68 00  
E-mail: [commande@ladocumentationfrancaise.fr](mailto:commande@ladocumentationfrancaise.fr)  
<http://www.ladocumentationfrancaise.fr>

Librairie Kléber  
1 rue des Francs Bourgeois  
FR-67000 STRASBOURG  
Tel: 33 (0) 3 88 15 78 88  
Fax: 33 (0)3 88 15 78 80  
E-mail: [librairie-kleber@coe.int](mailto:librairie-kleber@coe.int)  
<http://www.librairie-kleber.com>

**GERMANY/ALLEMAGNE  
AUSTRIA/AUTRICHE**

UNO Verlag GmbH  
August-Bebel-Allee 6  
DE-53175 BONN  
Tel.: (49) (0) 2 28 94 90 20  
Fax: (49) (0) 2 28 94 90 222  
E-mail: [bestellung@uno-verlag.de](mailto:bestellung@uno-verlag.de)  
<http://www.uno-verlag.de>

**GREECE/GRÈCE**

Librairie Kauffmann s.a.  
Stadiou 28  
GR-10564 ATHINAI  
Tel.: (30) 210 32 55 321  
Fax: (30) 210 32 30 320  
E-mail: [ord@otenet.gr](mailto:ord@otenet.gr)  
<http://www.kauffmann.gr>

**HUNGARY/HONGRIE**

Euro Info Service  
Pannónia u. 58, PF. 1039  
HU-1136 BUDAPEST  
Tel.: 36 1 329 2170  
Fax: 36 1 349 2053  
E-mail: [euroinfo@euroinfo.hu](mailto:euroinfo@euroinfo.hu)  
<http://www.euroinfo.hu>

**ITALY/ITALIE**

Licosa SpA  
Via Duca di Calabria 1/1  
IT-50125 FIRENZE  
Tel.: (39) 0556 483215  
Fax: (39) 0556 41257  
E-mail: [licosa@licosa.com](mailto:licosa@licosa.com)  
<http://www.licosa.com>

**NORWAY/NORVÈGE**

Akademika,  
PO Box 84, Blindern  
NO-0314 OSLO  
Tel.: 47 2 218 8100  
Fax: 47 2 218 8103  
E-mail: [support@akademika.no](mailto:support@akademika.no)  
<http://www.akademika.no>

**POLAND/POLOGNE**

Ars Polona JSC  
25 Obroncow Street  
PL-03-933 WARSZAWA  
Tel.: 48 (0) 22 509 86 00  
Fax: 48 (0) 22 509 86 10  
E-mail: [arspolona@arspolona.com.pl](mailto:arspolona@arspolona.com.pl)  
<http://www.arspolona.com.pl>

**PORTUGAL**

Livraria Portugal  
(Dias & Andrade, Lda.)  
Rua do Carmo, 70  
PT-1200-094 LISBOA  
Tel.: 351 21 347 42 82 / 85  
Fax: 351 21 347 02 64  
E-mail: [info@livrariaportugal.pt](mailto:info@livrariaportugal.pt)  
<http://www.livrariaportugal.pt>

**RUSSIAN FEDERATION /  
FÉDÉRATION DE RUSSIE**

Ves Mir, 17b. Butlerova ul.  
RU – 101000 MOSCOW  
Tel: +7 495 739 0971  
Fax: +7 495 739 0971  
E-mail: [orders@vesmirbooks.ru](mailto:orders@vesmirbooks.ru)  
<http://www.vesmirbooks.ru>

**SPAIN/ESPAGNE**

Díaz de Santos Barcelona  
C/ Balmes, 417-419  
ES-08022 BARCELONA  
Tel.: 34 93 212 86 47  
Fax: 34 93 211 49 91  
E-mail: [david@diazdesantos.es](mailto:david@diazdesantos.es)  
<http://www.diazdesantos.es>

Díaz de Santos Madrid  
C/ Albasanz, 2  
ES-28037 MADRID  
Tel.: 34 91 743 4890  
Fax: 34 91 743 4023  
E-mail: [jpinilla@diazdesantos.es](mailto:jpinilla@diazdesantos.es)  
<http://www.diazdesantos.es>

**SWITZERLAND/SUISSE**

Plantis Sàrl  
16 chemin des pins  
CH-1273 ARZIER  
Tel.: 41 22 366 51 77  
Fax: 41 22 366 51 78  
E-mail: [info@planetis.ch](mailto:info@planetis.ch)

**UNITED KINGDOM/ROYAUME-UNI**

The Stationery Office Ltd.  
PO Box 29  
GB-NORWICH NR3 1GN  
Tel.: 44 (0) 870 600 55 22  
Fax: 44 (0) 870 600 55 33  
E-mail: [book.enquiries@tso.co.uk](mailto:book.enquiries@tso.co.uk)  
<http://www.tsoshop.co.uk>

**UNITED STATES and CANADA/  
ÉTATS-UNIS et CANADA**

Manhattan Publishing Company  
468 Albany Post Road  
US-CROTON-ON-HUDSON,  
NY 10520  
Tel.: 1 914 271 5194  
Fax: 1 914 271 5856  
E-mail: [info@manhattanpublishing.com](mailto:info@manhattanpublishing.com)  
<http://www.manhattanpublishing.com>

**Council of Europe Publishing/Éditions du Conseil de l'Europe**

FR-67075 Strasbourg Cedex  
Tel.: (33) 03 88 41 25 81 – Fax: (33) 03 88 41 39 10 – E-mail: [publishing@coe.int](mailto:publishing@coe.int) – Website: <http://book.coe.int>

